163-704

RECORD, CASE No. 13,663.

163-704

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~189~~. 19 & 2

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, PLAINTIFF IN ERROR,

vs.

TEOFILO ESQUIBEL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED SEPTEMBER 28, 1889.

transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals and making the judgment of that Court final except in *extraordinary cases*."

Our case is only "extraordinary" in the exhibition of inexhaustible persistence in the attempt to avoid the payment of an honest debt. The Slickers appealed to the Circuit Court of Appeals when they might have brought the question of jurisdiction directly to this Court, and thus it would seem waived their right to any review by this Court, and when the Circuit Court of Appeals decided against them filed an elaborate Petition for a rehearing, which the Court maturely considered and rejected, and now they are knocking at the door of this Court with nothing to allege why they should not pay their debt except that the draftsman of the amended Bill omitted to allege that Mrs. Souther was a citizen of Virginia.

Respectfully submitted,

C. V. HARDIN,

SR. GEO. R. FITZHUGH,

Of Counsel for

Watson and Souther, Exrs.

163-104

RECORD, CASE No. 13,663.

163-704

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~189~~. ~~49~~ 8 2

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, PLAINTIFF IN ERROR,

vs.

TEOFILO ESQUIBEL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED SEPTEMBER 28, 1889.

RECORD, CASE No. 13,663.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 109.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, PLAINTIFF IN ERROR,

vs.

TEOFILO ESQUIBEL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	2	1
Petition	3	1
Plea	4	2
Similiter	4	2
Trial, verdict, and judgment	5	2
Allowance of appeal	6	3
Motion for new trial	6	3
Affidavit for appeal	7	4
Motion for appeal	7	4
Appeal bond	8	4
Bill of exceptions	9	5
Stipulation as to facts	9	5
Act No. 33, to incorporate the Texas Pacific R. R. Co., March 3, 1871	15	9
Act No. 53, supplementary to act No. 33, May 2, 1872	32	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1892.

	Original.	Print.
Bill of complaint in Texas & Pac. R. R. Co. *vs.* So. Pac. R. R. Co. of N. M.	36	19
Order to show cause, &c., in Texas & Pac. R. R. Co. *vs.* So. Pac. R. R. Co. of N. M.	55	30
Second amendment to bill in Tex. & Pac. R. R. Co. *vs.* So. Pac. R. R. Co. of N. M.	59	32
Final decree in Texas & Pac. R. R. Co. *vs.* So. Pac. R. R. Co. of N. M.	63	35
Memorandum of an agreement between Huntington & Gould, November 26, 1881	70	39
Deed from Tex. & Pac. R'y Co. to So. Pac. R. R. Co. of N. M., January 18, 1882	88	50
Deed from Texas & Pac. R'y Co. to So. Pac. R. R. Co. of N. M. *et al.*, January 18, 1882	90	51
Motion by plaintiff for instructions	94	54
Instructions given at request of defendant	95	54
Verdict	95	54
Judge's certificate to bill of exceptions	95	54
Stipulation as to record on appeal	96	55
Clerk's certificate	96	55
Order setting cause for argument	97	56
Stipulation as to filing assignment of errors and for submission	97	56
Assignment of errors	97	56
Joinder in error	98	57
Order submitting cause	98	57
Judgment	98	57
Copy of writ of error	99	58
Copy of citation	100	58
Copy of bond	100	59
Clerk's certificate	101	60
Opinion	102	60
Clerk's certificate to opinion	110	69
Writ of error	111	69
Citation	112	69
Bond	113	70

1 UNITED STATES OF AMERICA, } ss:
Territory of New Mexico,

Be it remembered that heretofore, to wit, on the twenty-second day of December, 1885, the Southern Pacific Railroad Company of New Mexico, by its attorneys, filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record, which is in the words and figures following, to wit:

2 In the Supreme Court of the Territory of New Mexico, January Term, 1886.

THE SOUTHERN PACIFIC RAILWAY COMPANY OF NEW MEXICO, Plaintiff in Error,
vs.
TEOFILO ESQUIBEL, Defendant in Error. } Ejectment.

Appeal from the third judicial district court.

Transcript of Record.

Catron, Thornton & Clancy, S. B. Axtell, attorneys for plaintiff in error; Rynerson & Wade, attorneys for defendant in error.

3 TERRITORY OF NEW MEXICO, } ss:
Third Judicial District Court, County of Doña Aña,

Be it remembered that on the 29th day of August, A. D. 1885, there was filed in the office of the clerk of said third judicial district court a complaint, of which the following is a copy:

TERRITORY OF NEW MEXICO, }
County of Doña Aña.

In the District Court of the Third Judicial District of the said Territory of New Mexico, sitting within and for the said county of Doña Aña, and for the trial of causes arising under the laws of said Territory, as well as the laws of the United States, at the September term, 1885.

To the Hon. Wm. B. Fleming, associate justice of the supreme court of said Territory and judge of the said district court:

Your petitioner, the Southern Pacific Railroad Company of New Mexico, a corporation duly organized under the laws of said Territory of New Mexico, complains of Teofilo Esquibel, a resident of the said county of Doña Aña, in a plea of ejectment for that whereas, heretofore, to wit, on the 29th day of August, in the year one thousand eight hundred and eighty-five, at the county of Doña Aña aforesaid, the plaintiff was entitled to the possession of that certain lot or parcel of land more particularly known and described as follows, to wit: Said land is situated in township 19 of the county of Doña Aña, Territory aforesaid, and is described in the United States

survey in the Las Cruces land district, Territory aforesaid, as follows: Being the S. W. ¼ of the N. E. ¼ and the S. E. ¼ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ of sec. 7, township 19 S., range 3 W., and contained 160 acres of land.

4 And afterwards, to wit, on the day and year aforesaid, the said defendant entered into said premises and unlawfully withhold and thence hitherto hath unlawfully withheld and still doth unlawfully withhold from plaintiff the possession thereof, to plaintiff's damage in the sum of five thousand dollars.

Wherefore plaintiff brings suit and prays judgment of this honorable court for the recovery of the possession of said premises and for the sum of five thousand dollars damages aforesaid and for its costs.

S. B. AXTELL,
Attorney for Plaintiff.

Be it further remembered that afterwards, to wit, on the 28th day of November, A. D. 1885, there was filed in the office of the clerk of the district court of said district a plea and similiter, of which the following are copies:

THE SOUTHERN PACIFIC R. R. Co.
vs.
TEOFILO ESQUIBEL. } Ejectment.

The said Teofilo Esquibel, by his attorneys, Rynerson & Wade, comes and defends the force and injury when, &c., and says that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said Southern Pacific Railroad Company hath above thereof complained against him; and of this he, the said Teofilo Esquibel, puts himself upon the country, &c.

RYNERSON & WADE,
For Defendant.

And the said plaintiff doth likewise.

CATRON, THORNTON & CLANCY AND
S. B. AXTELL,
Attorneys for Plaintiff.

Be it further remembered that afterwards, to wit, at a special term of said court and on the 5th day of said term, the same
5 being the 30th day of November, A. D. 1885, the following, among other, proceedings were had, to wit:

SOUTHERN PACIFIC R. R. Co.
vs.
TEOFILO ESQUIBEL. } Ejectment.

Now come the respective parties herein by counsel, and, issue being joined in said cause and both parties declaring themselves ready for trial, there comes a jury, to wit:

Eustaquio Barela,	Clemente Gambra,
Pablo C. Melendres,	Nathan Spatcier,
Romaldo Lara,	Jose Ma. Ramirez,
Juan Abolas,	Manuel Para,
Pedro Garicia 2nd,	Jose Lopez,
Manuel Navares,	George W. Maxwell,

twelve good and lawful men of the body of the county of Doña Aña, duly drawn, accepted, empannelled, and sworn to well and truly try the issue joined between the parties in this cause and a true verdict give according to the evidence, and said jury, having heard the evidence and the arguments of counsel and received the instructions of the court (which were given orally, written instructions being expressly waived by both parties), upon their oaths do say: "We, the jury in the above-entitled cause, do find the defendant not guilty."

And now the said plaintiff, by counsel, moves the court for a new trial in said cause for reasons set forth in motion therefor filed herein; which said motion being submitted to the court and the court, being fully advised in the premises, overruled said motion.

It is therefore considered by the court here that said motion be, and the same is hereby, overruled; to which ruling of the court the said plaintiff, by counsel, excepts.

6 It is therefore further considered by the court here that in pursuance of the said verdict the said case be, and the same is hereby, dismissed, and that the plaintiff pay the costs of this suit to be taxed, and that execution issue therefor.

And now the said plaintiff moves the court to grant it an appeal from the judgment rendered herein to the supreme court of the Territory; which said motion is by the court sustained and said appeal granted upon the plaintiff filing his affidavit in appeal herein; and it is ordered by the court that said plaintiff file with the clerk of this court his bond in appeal in the sum of five hundred dollars, with two or more good and sufficient sureties, to be approved by the court; and it is further ordered that the clerk of this court make an exemplified copy of all the proceeding- had in said cause and transmit the same to said supreme clerk.

Be it further remembered that on the same day, to wit, the 30th day of November, A. D. 1885, there was filed in the office of the clerk of the third judicial district court a motion for a new trial, of which the following is a copy, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO
vs.
TEOFILO ESQUIBEL.

Now comes the said plaintiff and moves the court to set aside the verdict in the above-entitled cause and grant a new trial for the reason that said verdict is against the law and the evidence in said cause.

CATRON, THORNTON & CLANCY,
S. B. AXTELL,
Attorneys for Plaintiff.

Be it further remembered that on the same day, to wit, the 30th day of November, A. D. 1885, there was filed in the office of
7 the clerk of said court an affidavit in appeal, of which the following is a copy, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO
vs.
TEOFILO ESQUIBEL.

District Court, County of Doña Aña, Special November Term, 1885.

Thomas B. Catron, being duly sworn, upon his oath says that he is the agent of the plaintiff in the above-entitled cause, and that said plaintiff appeals from the judgment of the said district court rendered in said cause, and that such appeal is not taken for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment and decision of the court in said cause.

THOMAS B. CATRON.

Subscribed and sworn to before me this November 30th, 1885.

W. J. JOBLIN, *Clerk.*

Be it further remembered that on the same day, to wit, the 30th day of November, A. D. 1885, there was filed in the office of the clerk of said court a motion for an appeal, of which the following is a copy:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO
vs.
TEOFILO ESQUIBEL.

District Court, County of Doña Aña.

Now comes the plaintiff in the above-entitled cause and moves the court to grant an appeal to the supreme court for reasons stated in the foregoing affidavit.

CATRON, THORNTON & CLANCY,
S. B. AXTELL,
Attorneys for Plaintiff.

8 Be it further remembered that afterwards, to wit, on the 1st day of December, A. D. 1885, there was filed in the office of the clerk of said court an appeal bond, of which the following is a copy, to wit:

Know all men by these presents that we, Samuel B. Axtell, as agent of and for the Southern Pacific Railroad Company, principal, and John H. Riley and Numa Reymond, as sureties, are held and firmly bound unto Teofilo Esquibel, his heirs, executors, and administrators, in the penal sum of five hundred dollars; to the payment of which, well and truly to be made, we bind ourselves and heirs, executors, and administrators firmly by these presents.

Witness our hands and seals this 1st day of December, A. D. 1885.

The condition of the foregoing obligation is such that whereas the above-named Southern Pacific Railroad Company of New Mexico has taken an appeal to the supreme court of said Territory from a judgment rendered in the third judicial district court of said Territory, sitting in and for the county of Doña Aña, at the special November term, A. D. 1885, in the suit of the said railroad company against the above-named Teofilo Esquibel:

Now, therefore, if the said appellant shall prosecute its appeal with due diligence to a decision in the said supreme court, and, in case the said judgment shall be affirmed or the said appeal dismissed, shall perform the judgment of the said district court and shall pay the costs and damages that may be adjudged against said appellant upon its appeal, then and in that event this obligation shall be null and void; otherwise in force and effect.

SAMUEL B. AXTELL, [SEAL.]
For the Southern Pacific R. R. Co.
JOHN H. RILEY. [SEAL.]
NUMA REYMOND. [SEAL.]

9 TERRITORY OF NEW MEXICO, }
County of Doña Aña. }

Be it remembered that on this first day of December, A. D. 1885, before me, the undersigned, personally came Southern Pacific R. R. by its agent, Samuel B. Axtell, and John H. Riley and Numa Reymond, its sureties, who are to me personally well known, and they each for himself acknowledged to me that they executed the foregoing obligation freely and voluntarily and for the uses and purposes therein set forth.

Witness my hand and official seal the day and year in this certificate first above written.

[SEAL.] A. L. CHRISTY,
Notary Public.

Approved.
W. F. HENDERSON, *Judge.*

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO }
vs.
TEOFILO ESQUIBEL. }

District Court, County of Doña Aña, Special November Term, 1885.

Be it remembered that upon the trial of the above-entitled cause at the special November term, A. D. 1885, of the district court sitting within and for the county of Doña Aña, in the Territory of New Mexico, the following testimony was offered in evidence and read to the jury on behalf of the plaintiff, to wit, a stipulation of plaintiff and defendant dated the 30th day of November, A. D. 1885, and signed by the attorneys for and on behalf of the respective parties, and which is in the words and figures following, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO
vs.
TEOFILO ESQUIBEL.

10 In the District Court, County of Doña Aña, November Special Term, 1885.

It is hereby stipulated and agreed in the above-entitled cause that the facts relating thereto are as follows:

First. The Southern Pacific Railroad Company of New Mexico is a corporation organized under the laws of the Territory of New Mexico in the year 1880.

Second. The Texas and Pacific Railroad Company is a corporation organized under an act of the Congress of the United States entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3rd, 1871, and an act of said Congress entitled "An act supplementary to an act entitled An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, this last-mentioned act having been approved May 2nd, 1872, which said two acts are hereby made a part of the stipulation, copies thereof being attached hereto, marked exhibits.

Three. The Texas and Pacific Railroad Company accepted said charter of incorporation, and within the time therein provided was organized thereunder.

Fourth. Within two years after the passage of said act of March 3, 1871, and in accordance with said two acts, the said Texas and Pacific Railroad Company did designate the general route of its said road as near as might be, and did file a map of the same in the Department of the Interior, at Washington, which said general route so designated corresponded with the line of road constructed as hereinafter stated by the Southern Pacific Railroad Company of New Mexico.

Fifth. Immediately after the filing of said map the Secre-
11 tary of the Interior caused the lands within forty miles on each side of said designated route within the Territories of New Mexico and Arizona and twenty miles within the State of California to be withdrawn from pre-emption, private entry, and sale.

Sixth. That thereafter the said Texas and Pacific Railroad Company did commence the construction of its said road at the eastern terminus thereof, at or near Marshall, in the State of Texas, as described in said act, and did prosecute the same and have the same completed at or near El Paso, designated as a point on said road by said acts of Congress, on or before the 2nd day of May, 1882.

Seventh. That the Southern Pacific Railroad Company of New Mexico, in the years 1880 and 1881, after its organization, construct*ing* a railroad of the character, kind, and description required by said two acts of Congress from the western boundary line of the Territory of New Mexico, through the Territory of New Mexico, on

the said line of the general route of said Texas & Pacific Railroad Company as designated in and by the said map filed in the Department of the Interior as aforesaid, to the State line of Texas, on the Rio Grande river, near El Paso, Texas, and connected the same with the said Texas and Pacific railroad, constructed as aforesaid at or near El Paso aforesaid.

Eighth. After the completion by the Southern Pacific Railroad Company to El Paso the Texas and Pacific Railroad Company claimed and insisted the same was built upon its right of way under said acts of incorporation, and that the said road thereby became the property of said Texas and Pacific Railroad Company, and thereupon, in May, 1881, commeneed a suit in the third judicial district court of the Territory of New Mexico against the Southern Pacific Railroad Company of New Mexico to have said road
12 so constructed by the said Southern Pacific Railroad Company of New Mexico decreed to be the property of said Texas and Pacific Railroad Company, a copy of the bill of complaint in said cause being hereto attached and made a part of this agreement, as also is a copy of the order made by Hon. Warren Bristol, as judge of said district court, on the filing of said bill of complaint.

Ninth. That during the pendency of said suit the said Texas and Pacific Railroad Company definitely fixed the line of its proposed road under said acts of Congress across the Territory of New Mexico at the centre of the road-bed of the said road constructed as aforesaid by the Southern Pacific Railroad Company of New Mexico in the manner as required by law.

Tenth. Owing to doubts and uncertainties as to the result of said litigation and for reasons therein stated an agreement to compromise the same was entered into by and between the said Texas and Pacific Railroad Company and the Southern Pacific Railroad Company of New Mexico, a copy of which said agreement is filed herewith and made a part of this stipulation as evidence in this cause; that in accordance with said agreement a decree was entered in said cause, a copy of which is filed herewith and made a part of this stipulation as evidence in this cause, and also two deeds of conveyance were made and executed by the said Texas and Pacific Railroad Company to the said New Mexico and Southern Pacific Railroad Company of New Mexico, by one of which — all the right, title, interest, claim, and demand of the said Texas and Pacific Railroad Company and to the right of way two hundred feet wide from the Arizona line across New Mexico at or near El Paso, on the line of the road of the Southern Pacific Railroad Company of New Mexico, a copy of which said deed is hereto attached and made a part of the stipulation as evidence in said cause, the other
13 deed of conveyance being an assignment and conveyance to the Southern Pacific Railroad Company of New Mexico by the Texas and Pacific Railroad Company of the right of way, the right to take materials from the public lands; also grounds for station buildings, workshops, wharves, switches, side tracks, etc., depot grounds; also the right of franchise of the Texas and Pacific Railroad Company to lay out, locate, construct, finish, maintain, and

enjoy a continuous railroad and telegraph line, with appurtenances, from a point on the Rio Grande near El Paso westward on the most direct and eligible route near the 32d parallel of north latitude, granted to said Texas and Pacific Railroad Company by said acts of Congress, and also all the lands granted to said Texas and Pacific Railroad Company by the ninth section of said act of Congress, approved March 3, 1871, to aid in the construction of the railroad and telegraph line described in the first section of said act, a copy of which said conveyance is attached hereto and made a part of this stipulation as evidence in this cause.

Eleventh. That the said railroad provided to be constructed under and in accordance with the said two acts of March 3, 1871, and May 2, 1872, has not been completed in that portion of the State of California between the Colorado river and San Diego.

Twelfth. That the said defendant, since the said Texas and Pacific Railroad Company designated its general route and filed a map thereof as aforesaid, and after it had definitely fixed the line of said road across the Territory of New Mexico, and after the making of said agreement with the Southern Pacific Railroad Company of New Mexico and entering the said decree and making, executing, and delivering the said two deeds of conveyance, the said
14 defendant entered upon the land in question, which is a part of one of the odd sections within forty miles of the line of said road as fixed and designated by the Texas and Pacific Railroad Company as aforesaid, said land in question being situated in the county of Doña Aña, and said defendant occupied and held possession of same at the time of the commencement of this suit adverse to plaintiff.

Thirteenth. That on February 28, 1885, an act of Congress in the following words was passed and approved: "That all lands granted to the Texas Pacific Railroad Company, under the act of Congress entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March third, eighteen hundred and seventy-one, and acts amendatory thereof or supplemental thereto, be and they are hereby declared forfeited and the whole of said lands restored to the public domain and made subject to the disposal under the general laws of the United States, as though said grant had never been made: Provided, that the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

"SEC. 2. That the act of March 3rd, eighteen hundred and seventy-five, entitled 'An act for the relief of settlers within railroad limits,' is hereby repealed. Approved February 28, 1885."

Fourteenth. That the said defendant on the 27th day of March, A. D. 1885, filed his homestead entry on the land in question with the register of the United States land office at Las Cruces, New Mexico, paid the lawful fees for the same and received the usual certificate therefore.

CATRON, THORNTON & CLANCY AND
S. B. AXTELL, *Attorneys for Plaintiff.*
RYNERSON & WADE,
Attorneys for Defendant.

15 Plaintiff here introduced and read in evidence on said trial the act of Congress of the United States, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," and which was approved March 3rd, 1871; which said act is in the words and figures as follows, to wit:

No. 33.—An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That John C. Fremont, James L. Alcorn, G. M. Dodge, O. C. French, John D. Caldwell, J. J. Noah, A. C. Osborn, Timothy Hurley, C. C. Pool, Silas N. Martin, John M. Corse, George E. Wentworth, Philip H. Morgan, J. D. Cameron, Marshall O. Roberts, James L. Hodges, John Ray, W. Vermilye, Enoch L. Faucher, Charles F. Livermore, Joseph H. Oglesby, John Whytock, Daniel Drew, F. S. Davis, W. Orton, A. C. Babcock, Thomas A. Scott, Samuel D. Hoffman, H. Ramsdale, William H. Jackson, R. C. Parsons, Delos W. Emmons, M. A. Southworth, John H. Hall, G. C. Kinsey, W. P. Clark, James Dart, H. Jacobs, L. T. Smith, W. P. Dole, C. A. Weed, A. P. K. Safford, H. McCullough, Charles Jackson, Elisha Dyer, Alfred Anthony, James Hoy, M. W. Benjamin, H. D. Cook, Joseph R. West, W. S. Huntington, J. M. Tebbetts, C. C. Leondridge, D. D. Porter, M. Woodhull, Hiram Price, M. C. Hunter, W. T. Walters, J. B. Brownlow, T. A. Morris, Owen Tuller, J. H. Tedlie, R. M. Bishop, Samuel Craighead, D. N. Stanton, Augustus H. Whiting, G. L. Johnston, J. W. Goodland, Powell Clayton, Samuel Tate, W. Bolton, H. Robinson, George Maney, O. H. Bynum, M. Burns, J. C. Goodloe, E. G. Barney, Cyrus Busey, J. W. Forney, J. Lockwood, E. M. Davis,
16 N. Patton, W. Flanegan, G. O'Brien, G. P. Buel, G. H. Gidding, J. J. Newell, E. W. Rice, R. M. Shoemaker, Samuel Sloan, S. W. Morton, J. B. Bowman, L. M. Flournoy, J. J. Hinds, G. R. Weeks, J. T. Ludling, B. C. Gilbert, B. D. Williams, Thomas Olcott, G. A. Fosdick, Harry Hays, P. S. Forbes, John T. Sprague, L. R. Marsh, A. W. Beckwith, J. C. Stanton, Cyrus H. Baldwin, A. J. Hamilton, Rush R. Sloan, Silas C. Colgrove, Samuel D. Jones, N. H. Decker, William N. Leet, B. F. Allen, J. B. Chaves, Augustus Kountze, John N. Goodwin, William S. Rosecrans, Michael Hahn, H. C. Warmouth, J. S. Williams, G. M. Spencer, L. J. Higby, W. C. Kimball, and all such persons as shall or may be associated with them, and their successors, are hereby created a body politic and corporate in fact and in law, by the name, style and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas; thence by the

most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the bay of San Diego, in the State of California, pursuing in the location thereof, as
17 near as may be, the thirty-second parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the pur[po]ses of this act.

SEC. 2. That the persons named in the first section of this act shall constitute a board of commissioners (twenty of whom shall constitute a quorum for the transaction of business,) to be known as the Texas Pacific railroad commissioners, who shall meet in the city of New York within ninety days after the passage of this act, at a time to be designated in a notice to be signed by the person first named in the list of corporators and six of his associates, and to be published for two weeks in, at least, one daily newspaper in New York, New Orleans, and Washington; and, when so met, they may cause books to be opened for the subscription of the capital stock of said company, and when twenty thousand shares, amounting to two millions of dollars, shall have been subscribed, and ten per centum actually paid thereon, in money, to the treasurer, to be elected by said commissioners, who shall give bond for its safe keeping and payment to the treasurer of the company when organized, then it shall be lawful for such subscribers or stockholders, or a majority thereof, to organize said company in accordance with the provisions of this act, and to elect not less than seven, nor more than seventeen directors, a majority of whom shall be necessary to the transaction of business, and who shall hold their offices for one year and until their successors shall be elected and qualified; and the said directors shall immediately proceed to elect a president, vice-president, secretary and treasurer; the president and vice-president shall be directors. At all elections for directors, each share of stock shall be entitled to one vote, which may be given by the holders in person, or by proxy, who shall also be a shareholder. The directors shall hold their offices for any term not exceeding three
18 years, as may be provided in the by-laws; and the annual meetings of stockholders shall take place as provided for in said by-laws.

SEC. 3. That the capital stock of the Texas Pacific Railroad Company shall be fixed by the board of directors, at a sum not exceeding fifty millions of dollars, in shares of one hundred dollars; and when the amount is so fixed, it shall never be increased except by consent of Congress. Assessments upon said stock shall only be made by a majority vote of the whole number of directors at a regular meeting, which said assessments shall be paid at the expiration of thirty days after a notice given in one newspaper in each of the cities of Washington, Philadelphia, New York, and New Orleans.

SEC. 4. That the said Texas Pacific Railroad Company shall have

power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State or territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of railroads to the Pacific ocean.

SEC. 5. That the said company shall have power and authority to make running arrangements with any railroad company or companies heretofore chartered, or that may hereafter be chartered by congressional, State, or territorial authority; also to purchase lands, or to accept donations, or grant of lands or other property from States or individuals, for the purpose of aiding in carrying out the object of this company.

SEC. 6. That the rights, lands, land grants, franchises, privileges and appurtenances, and property of every description, belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company; Provided, that in all contracts made and entered into by said company with any and all other railroad company or companies, to perfect such aforesaid consolidation or purchase, the indebtedness or other legal obligations of said company or companies shall be assumed by the said Texas Pacific Railroad Company as may be agreed upon, and no such consolidation or purchase shall impair any line which may exist on any of the railroads so consolidated or purchased; but said company shall not assume the debts or obligations of any company with which it may consolidate or purchase as aforesaid to an amount greater than the cash value of the assets received from the same.

SEC. 7. That the said Texas Pacific Railroad Company shall have power to make and enforce rules and by-laws for the election of its officers and the government and management of the business of the company, and to do and perform all needful and proper things to be done and performed to promote the objects of the company hereby incorporated, not inconsistent with the laws of the United States and the provisions of this charter.

SEC. 8. That the right of way through the public lands be, and the same is hereby, granted to the said company for the construction of said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take, from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands; and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, side tracks, turn-tables, water stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point.

SEC. 9. That for the purpose of aiding in the construction of

the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have *not have* been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral" where it occurs in this act, shall not be held to include iron or coal; provided, however, that no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "ship's channel," as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way, as herein granted: And provided, further, that all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted.

SEC. 10. That when the route of said railroad and telegraph line shall pass through the lands of private persons, or where it may be necessary for said railroad company to take any lands belonging to private persons for any of the purposes herein mentioned necessary to said road, such right of way through or title to such lands, shall be secured in accordance with the laws of the State or Territory in which they may be situated.

SEC. 11. That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds, secured by mortgage, namely: first, construction bonds; second, land bonds. Construction bonds shall be secured by mortgage, first, on all or any

portion of the franchises, road-bed, or track of said railroad, and all the appurtenances thereto belonging, when constructed or in the course of construction, from a point at or near Marshall, to
26 ship's channel, in the bay of San Diego, in the State of California, as aforesaid. Land bonds shall be secured by mortgage, first on all or any portion of the lands hereby granted in aid of construction of said railroad as is provided for in this act; second, on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of lands may have been made, or may hereafter be made, by any congressional, State or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation: Provided, that all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed: And provided also, that the proceeds of the sales of the aforesaid construction and land bonds shall be applied only in the construction, operation and equipment of the contemplated railroad line: And provided further, that said mortgage shall in no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation.

SEC. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road as near as may be, and shall file a map of the same in the Department of the Interior;
27 and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry, and sale: Provided, however, that the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company.

SEC. 13. That the president of the company shall annually, by the first day of July, make a report and file it with the Secretary of the Interior, which report shall be under oath, exhibiting the financial situation of the company, the amount of money received and expended, and the number of miles of road constructed each year;

and further, the names and residences of the stockholders, of the directors, and of all other officers of the company, the amount of stock subscribed, and the amount thereof actually paid in, a description of the lines of road surveyed and fixed upon for construction, the amount received from passengers and for freight, respectively, on the road, a statement of the expenses of said road and its fixtures, and a true statement of the indebtedness of said company, and the various kinds thereof.

SEC. 14. That the certificates of the capital stock must be signed by the president and secretary, and attested by the seal of the company, and shall contain an extract from the proceedings of the board of directors, fixing the amount thereof, as well as from this
28 act authorizing such issue. All the bonds and mortgages issued by said company must be signed by the president and secretary, and attested by the seal of said company, and shall contain an extract from the law authorizing them to be issued. The face value of said bonds shall be one thousand dollars in gold, and shall be redeemable at such times, and to bear such rate of interest, payable semi-annually in gold, as may be determined by the directors. The total value of the construction bonds to be issued shall not exceed thirty thousand dollars per mile of said railroad, and the total face value of the land bonds shall not exceed two dollars and fifty cents per acre for all lands mortgaged, the total amount of each to be determined by the board of directors.

SEC. 15. That all railroads constructed, or that may be hereafter constructed, to intersect said Texas Pacific railroad, shall have a right to connect with that line; that no discrimination as regards charges for freight or passengers, or in any other matter, shall be made by said Texas Pacific Railroad Company against any of the said connecting roads; but that the same charges per mile as to passengers, and per ton to mile as to freight, passing from the said Texas Pacific railroad over any of said connecting roads, or passing from any of said connecting roads over any part of said Texas Pacific railroad, shall be made by said company as they make for freight, and passengers over their own road: Provided also, that said connecting roads shall reciprocate said right of connection and equality of charges with said Texas Pacific railroad: And provided further, that the rates charged for carrying passengers and freight, per mile, shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads.

29 SEC. 16. That said road shall be constructed of iron or steel rails manufactured from American ore, except such as may have heretofore been contracted for by any railroad company which may be purchased or consolidated with by the company hereby incorporated, as provided by this act.

SEC. 17. That the said Texas Pacific Railroad Company shall commence the construction of its road simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said

points complete and in running order within two years after the passage of this act; and to so continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act; and upon failure to so complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion.

SEC. 18. That the President of the United States, upon the completion of the first section of twenty miles, shall appoint one commissioner, whose duty it shall be to examine the various sections of twenty miles as they shall be completed, and report thereon to him in writing; and if, from such report, he be satisfied that said company has fully completed each section of its road, as in this act provided, he shall direct the Secretary of the Interior to issue patents to said company for the lands it is entitled to under this act, as fast as each section of said road is completed.

SEC. 19. That the Texas Pacific Railroad Company shall
30 be, and it is hereby declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military and all other governmental services at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purpose aforesaid.

SEC. 20. That it shall not be lawful for any of the directors, either in their individual capacity or as members of an incorporated or joint stock company, to make any contracts or agreements with the said Texas Pacific Railroad Company for the construction, equipment or running of its road, or to have any interest therein; and all such contracts or agreements are hereby declared null and void, and all money or property received under such contracts or agreements may be recovered back for the benefit of the company by any stockholder.

SEC. 21. That any railroad company whose route lies across the route of the Texas Pacific railroad may cross the same, and for the purpose of crossing shall have the right to acquire at the double minimum price all lands, whether of the United States or granted by this act, which shall be needed for a right of way two hundred feet wide through said lands, and for depots, stations, side tracks, and other needful purposes, not exceeding for such purposes forty acres at any one station.

SEC. 22. That the New Orleans, Baton Rouge and Vicks-
31 burg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the said Texas Pacific railroad

at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company, at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California: Provided, that said company shall complete the whole of said road within five years from the passage of this act.

SEC. 23. That for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California, is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six: Provided, however, that this section shall in no way affect or impair the right, present or prospective, of the
32 Atlantic and Pacific Railroad Company or any other railroad company.

Approved March 3, 1871 (16 Stats., page 573).

Plaintiff then further introduced and read in evidence on said trial the act of the Congress of the United States entitled "An act supplementary to an act entitled 'An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,'" approved March third, eighteen hundred and seventy-one, and which was approved May 2, 1872; which said act is in the words and figures following, to wit:

No. 53.—An act supplementary to an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, approved March third, eighteen hundred and seventy-one."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the name, style, and title of the Texas Pacific Railroad Company shall hereafter be "The Texas and Pacific Railway Company;" and the said The Texas and Pacific Railway Company shall have, possess, and enjoy all the rights, privileges, and franchises heretofore conferred upon the said Texas Pacific Railroad Company.

SEC. 2. That the said The Texas and Pacific Railway Company shall

have power and authority to issue the construction and land bonds authorized by the eleventh section of said act of incorporation, for such amounts, not exceeding forty thousand dollars per mile of said road, of construction bonds, as said company may deem needful to provide for the construction and equipment of its line, and to include in the mortgage or mortgages to secure said construction
33 bonds all or any portion of the lands granted in aid of the construction of said railroad; and in the mortgage or mortgages to secure said land bonds, any portion of said lands not so used to secure the construction bonds aforesaid; and all or any portion of the lands acquired by the terms of consolidation lawfully authorized by the fourth section of said act of March third, eighteen hundred and seventy-one, with any railroad company or companies to whom grants of land may have been made, or may hereafter be made, by any congressional, State, or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation, and within the time limited for the completion of the road, and all such lands of every description shall be subject to all limitations and conditions now by law existing in relation thereto, and as modified by this act; and this act shall not be construed to revive, enlarge, extend or create any land grant whatever, beyond that heretofore granted by Congress, and which shall duly inure to said company upon compliance with the terms of this act in relation to the times fixed for completion of said railway, and all such mortgages shall be subject to all the conditions and limitations by law existing under this act and the acts to which it is supplementary in respect to such lands, and shall not be held to vest any title in the mortgage or create any lien on such lands, other than such company is or may become lawfully entitled to vest or create thereunder; but the amount of said land bonds shall not exceed two and a half dollars per acre for all lands covered by the mortgage or mortgages securing the same.

SEC. 3. That all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution: Provided, that the aforesaid bonds and the authorized capi-
34 tal stock, or the proceeds thereof, shall be applied only for the purpose of securing the construction, operation and equipment of the contemplated railroad line, under lawful contracts with such parties, and on such terms and conditions as said company may deem needful, and for the further purpose of purchase, consolidation, completion, equipment and operating of the other roads, as contemplated by said act and specified therein, being a part of the aforesaid railroad line, and for the expenses necessary and incident to the works authorized thereby: Provided, however, that said road and its equipment shall be of the standard heretofore required by the United States Government for the existing Pacific railway lines; And provided further, that said mortgage or mortgages shall in nowise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation.

SEC. 4. That said road shall be constructed of iron and steel rails

manufactured from American ore, except such as may have been contracted for before consolidation by any railroad company which may be purchased by or consolidated with this company.

SEC. 5. That the said Texas and Pacific Railway Company shall commence the construction of its road at or near Marshall, Texas, and proceed with its construction, under the original act and this supplement, or in pursuance of the authority derived from any consolidation as aforesaid, westerly from a point near Marshall, and towards San Diego, in the State of California, on the line authorized by the original act, and so prosecute the same as to have at least one hundred consecutive miles of railroad from said point complete and in running order within two years after the passage of this act; and so continue to construct, each year thereafter, a sufficient number of miles, not less than one hundred, to secure the completion of the whole line,
35 from the aforesaid point on the eastern boundary of the State of Texas to the bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act; and said road from Marshall, Texas, throughout the length thereof, shall be of uniform gauge: Provided however, that the said company shall commence the construction of said road from San Diego eastward within one year from the passage of this act, and construct not less than ten miles before the expiration of [the] second year, and, after the second year, not less than twenty-five miles per annum in continuous line, thereafter between San Diego and the Colorado river until the junction is formed with the line from the east at the latter point or east thereof; and upon failure to so complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion; and it shall also be lawful for said company to commence and prosecute the construction of its line from any other point or points on its line; but nothing in this act contained shall be so construed as to authorize the grant of any additional lands or subsidy, of any nature or kind whatsoever, on the part of the Government of the United States: Provided, that said Texas and Pacific Railway Company shall be, and it is hereby, authorized and required to construct, maintain, control, and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points, of the same gauge as the said Texas and Pacific Railroad; and that all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges, for the transaction of business in connection with the said Texas and Pacific Railway as are granted to roads intersecting therewith: Provided further, that nothing herein
36 shall be construed as changing the terminus of said Texas and Pacific Railway from Marshall, as provided in the original act.

SEC. 6. That all acts or parts of acts inconsistent with this supplement be, and the same are *are* hereby, repealed.

Approved May 2, 1872 (17 Stats., p. 59). See Nos. 33, 121.

Plaintiff then further introduced and read in evidence on said trial the bill of complaint filed on the — day of May, A. D. 1881, in the cause of The Texas and Pacific Railroad Company, complainants, against The Southern Pacific Railroad Company of New Mexico, in the third judicial district court of New Mexico; which said bill of complaint is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

Between The Texas and Pacific Railway Company, Complainant, and The Southern Pacific Railroad Company of New Mexico, Defendant.

Third Judicial District. In Chancery.

To the Honorable Warren Bristol, associate justice of the supreme court of the Territory of New Mexico and presiding judge of the third judicial district court of said Territory:

Your orator, The Texas and Pacific Railway Company, a corporation duly created under and by virtue of an act of the Congress of the United States approved March 3rd, 1871, and the subsequent acts amendatory thereto, brings this its bill against The Southern Pacific Railroad Company of New Mexico; and thereupon your orator, humbly complaining, shows to your honors that it is a corporation, having its principal office in the city of New York, in the State of New York; that the object and purposes of the act of Con-
37 gress incorporating said Texas and Pacific Railway Company were to authorize and empower it to build, construct, maintain, and operate a continuous line of railway and telegraph from or at a point near Marshall, Harrison county, in the State of Texas, thence by the most direct and eligible route, to be determined by your orator, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by your orator, through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and it was in and by said act of incorporation vested with all powers, privileges, and immunities necessary to carry into effect the purposes of said act.

And your orator further shows to your honors that it was further provided in and by said act of incorporation, as an inducement to the acceptance of the charter so created and to the construction of the railroad of your orator, that the right of way through the public land be and *were* thereby granted to your orator for the construction of the said railroad and telegraph line, which right of way so granted is to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands; and there is also by said act of incorporation and charter granted to your orator grounds for work-shops, station and depot houses, wharves, switches, side tracks, turn-tables, water stations, and such other structures as

may be necessary for your orator's line of railway, not exceeding forty acres of land at any one point.

And your orator further shows to your honors that, as an additional inducement to the acceptance of said charter and the expenditure of the vast sums of money necessary in the construction of said line of railway, it was further provided that for the pur-
38 pose of aiding in the construction of said railroad and telegraph line therein provided for there was at that time, to wit, on March third, 1871, granted to your orators, its successors and assigns, every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line might be adopted by your orator, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California.

And your orator further shows to your honors that, as an additional inducement to the acceptance of said charter and the construction of said line of railway, it was further provided that your orator, within two years after the passage of said act of Congress, should designate the general route of its said road as near as may be, and should file the same in the Department of the Interior, and when the map was so filed the Secretary of the Interior should cause the lands within forty miles on each side of said designated route within the Territories and twenty miles within the State of California to be withdrawn from pre-emption, private entry, and sale.

And your orator further shows to your honors that the said act of Congress incorporating your orator further provided that it should be, and it was thereby declared to be, a military and post road, and that no act of your orator nor any law of any State or Territory should impede, delay, or prevent your orator from performing its obligations to the United States in that regard. Extracts of said acts of Congress are hereto attached, marked A.

And your orator further shows to your honors that the rights and privileges so as aforesaid granted, continued, and guaranteed to your orator constitute a species of property known in law as a
39 franchise, and is of a nature peculiar and extraordinary; that it consists in part of the right or franchise to construct and operate a railway, with the ordinary and usual rights and privileges appurtenant thereto, and further in the right or franchise, by grading, constructing equipping said road, to acquire from the United States patents for the lands of said United States to the extent of twenty alternate sections of public lands per mile in the Territories and ten sections of land per mile in California, on each side of said railway line as adopted by your orator, for each mile of said railway so graded and constructed, and in the further right or franchise, and especially the exclusive right to own and patent the same within the limits of said reservation of forty miles in the Territories and twenty miles in California; that said several rights, to wit, the right to construct and operate a railway, to acquire patents for the lands by said construction, to own the said alternate

sections within said reservations to the exclusion of all others, are interdependent in their nature, neither being as valuable without the other; that the right of said reservation is of the essence of the whole franchise and is that which gives its chief value to the same.

And your orator further shows that in or about the year 1871, and in full reliance on the grants, guarantees, and assurances by the United States to your orator of the said franchises, and especially of its exclusive rights, privileges, and immunities, and in the belief that such exclusive rights to construct, operate, and maintain said line of railway and to own and use said rights and privileges and the exclusive right to patent, use, and enjoy said lands so granted was an inherent part of the franchise so created, did organize under and in pursuance of said charter and the subsequent amendatory acts as the Texas and Pacific Railway Company, and accepted the said franchises, grants, and reservations, rights, privileges, and immunities as the consideration for and the conditions of its organization, and thereafter, within the times limited by said acts of Congress and the subsequent acts amendatory thereof, did and performed all the acts and things necessary to the full and complete vesting, securing, and preserving of the franchises, rights, and privileges so granted and continued.

And your orator further shows to your honors that it designated and located the general route of its road, and on the second day of September, 1871, it duly filed its map and location of its line from Marshall, in the State of Texas, to San Diego, in the State of California, in the Department of the Interior at Washington, and that said map was by said Secretary of the Interior filed in the General Land Office at Washington on said day; that thereafter the lands on your orator's line in the Territory of New Mexico were withdrawn by letter of the 22nd of November, 1871, of the Secretary of the Department of the Interior, which was received at the land office at Santa Fé, New Mexico, on the 4th day of December, 1871, and that said lands for distance of forty miles on each side of its line then and ever since have been withdrawn from entry and occupation and sale, and are held for the exclusive and sole use of your orator, to be enjoyed, managed, used, and disposed of by your orator in accordance with said act of incorporation and laws supplemental thereto; and your orator further shows to your honors that for the better understanding of its line and location, and that your honors may ascertain the extent of its rights and privileges, and the land reserved and withdrawn by and in accordance with said act of Congress, the duly certified copies thereof as filed and accepted by the Department of the Interior as aforesaid, showing said route
41 of your orator, will be exhibited and produced whenever requested by your honors.

And your orator shows to your honors that the designated route of the railroad of your orator as mapped and filed in the Department of the Interior is substantially as follows: Beginning at a point on the western boundary line of the Territory of New Mexico, about twenty miles north of the 32d parallel of north latitude, near to a place called Stein's peak, thence running southeastwardly and

eastwardly, passing near to a place known as Leitendorf's Wells; thence northeastwardly to a point about four miles south of a place called Soldier's Farewell; thence eastwardly and southeastwardly to the Rio Mimbres, about five miles below Black Rock tank on said river, and thence crossing said river in a general southeastern direction to the eastern boundary line of the Territory of New Mexico, near the southeast corner of said Territory, crossing the Rio Grande river, which separates said Territory from the State of Texas at or near and north of the town of Franklin, in the county of El Paso, in said State of Texas, and at or near the town of El Paso, in the Republic of Mexico.

And your orator shows that the forty-mile reservation in favor of your orator as aforesaid, on each side of said line, has been duly and plainly marked on the Government maps of said Territory, and especially on the maps in the General Land Office, Department of the Interior, and are notice to the world of the existence of said reservation and the rights of your orator therein.

And your orator further shows to your honors that by said surveys, designations, and returns, and by said action of the Secretary of the Department of the Interior at Washington, the land reservation granted to the said Texas and Pacific Railway Company by its said charter became vested, defined, and officially recognized,

and is as contained in said letter of the Secretary of the In-
42 terior of the date of the 22nd day of November, 1871, and filed in the land office of Santa Fé, in said Territory of New Mexico, on the 4th day of December, 1871; a certified copy of which is hereto attached and made part of this bill and marked Exhibit B; and your orator further shows that on the filing of said letter the lands therein described became then and ever since then are specially reserved from entry, sale, or pre-emption.

And so your orator submits to your honors that by said act of incorporation and the laws supplementsry thereto, by the actual survey and location of the line of its road across the Territory of New Mexico, by the absolute grant to your orator of every alternate section of public land to the amount of twenty alternate sections per mile on each side of said railway line as adopted, designated, and located by your orator through said Territory of New Mexico, and by the withdrawal of all said lands by the Department of the Interior from pre-emption, private entry, and sale, for the sole use of your orator, and in the full compliance in all respects by your orator with the terms and conditions of said act of incorporation and the laws amendatory and supplemental thereto, your orator became, in the year 1871, vested with the right to said lands and every part thereof so withdrawn from pre-emption and sale and became and was vested with the sole and exclusive right to locate, construct, furnish, maintain, and enjoy a railroad and telegraph line in, over, and upon said lands or any part thereof and upon the line and route so designated, located, and filed in the Department of the Interior.

And your orator further shows that after its said organization it proceeded to grade and construct its road-bed and railway, com-

mencing near the city of Marshall, in the State of Texas, and that in the year 1873 had completed and was maintaining and
43 operating in the State of Texas more than three hundred miles of first-class railway, and that in or before the year 1876 it had constructed and had in operation over one hundred additional miles of railway, so that in or before the year 1877 your orator had constructed and in complete operation and fully equipped upwards of four hundred and forty-three miles of railway in Texas, with the western terminus at the city of Fort Worth, in the interior of said State, and upwards of forty miles additional under contract; that in the year 1873 the continuation of said work of construction was interrupted by a financial panic, which affected the whole country, and that by reason of such financial depression your orator was unable for a time to proceed with construction of its railway and telegraph line as rapidly as it would have done if said financial difficulties had not existed. Your orator shows to your honors that so soon as financial confidence was restored it put under contract more than six hundred miles of its road, two hundred and thirty of of which are completed and in actual operation, and almost all of the remaining portion graded and ready for its ties and track, with many thousand laborers at work on the same, and that it has, since it first commenced such construction, completed and in actual operation nearly eight hundred miles of its line of railway, and that in or before the year 1882 its whole line from its initial point will be completed to the eastern boundary line of the Territory of New Mexico; and it is the intention and purpose of your orator to proceed without delay to construct its line of railway west of said eastern boundary of New Mexico on the route designated and located by your orator on the maps or surveys filed in the Department of the Interior, as heretofore herein shown, and demand the patents for the alternate sections of land reserved by the General Government of the United States.

44 And your orator further shows to your honors that by said act of Congress of March 3d, 1871, for the purpose of connecting your orator's railway with the city of San Francisco, the Southern Pacific Railroad Company of California was by said act authorized to construct a line of railroad from a point at or near Tehachapi pass, by way of Los Angeles, to your orator's road at or near the Colorado river, in California, and to no other point or points or places on or near your orator's line.

And your orator is informed and believes that with full knowledge of said act of Congress of March 3d, 1871, and the rights of your orator thereunder, and with full notice of the location and filing of its map in the Interior Department and the reservation and withdrawal of said lands from entry, pre-emption, sale, and occupation, said Southern Pacific railroad, in fraud of your orator's rights, illegally and in violation of law and the exclusive rights, privileges, and immunities granted to your orators, did, for the purpose of injuring, destroying, and rendering valueless its land grant and robbing it of its franchise, pretend to obtain a charter under the laws of the Territory of New Mexico under the name of The

Southern Pacific Railroad Company (of New Mexico), the defendant herein.

And your orator further shows to your honors that by virtue of said pretended charter (which your orator does not admit to be a legal incorporation) the said defendant pretends it was and is authorized to construct a line of railroad across and through said Territory of New Mexico, the terminus of said pretended road being described in said act of incorporation as follows: The western terminus at a point of connection with the Southern Pacific railroad (of Arizona) on the western boundary with the thirty-second parallel of north latitude, the eastern terminus to be on the Rio
45 Grande at a point to be selected by the company between Mesilla and the southern boundary of said Territory.

And your orator further shows to your honors that said charter and the pretended rights thereunder were obtained after your orator's rights, privileges, and immunities had become vested and with full knowledge thereof, as heretofore more fully set forth, and after its exclusive right to build, construct, operate, and maintain its line of railway and telegraph over its designated route as aforesaid had been recognized by the proper department of the United States.

Your orator further represents and charges that it has been informed and believes that the chief object of and inducement to the Congress of the United States to incorporate your orator was to provide a competing line of railways, transcontinental in its object and designs, with a view of affording to the commerce of the count-y cheap transportation, or at least transportation likely to be cheapened by competitive lines from the Atlantic to the Pacific coast; that defendant, representing the same interest that then owned and controlled and now owns and controls the Central Pacific of California, operating and owning as it did the only railway communication with the Pacific coast, extending from Ogden to San Francisco, confederated and conspired with others to defeat the object of that congressional legislation by building the Southern Pacific of California and, under other names and associations, constructing a line across Arizona and more r-cently and now the line in question across the Territory of New Mexico, and that these designs and purposes had for their chief if not their sole object the defeat of the purposes of the Government to provide for a competing line to their Central Pacific of California; and if their unlawful acts and doings in the construction of said line or lines be not so declared by
46 the courts the same parties owning and controlling the Central Pacific of California will operate the other and more southerly railroad to the Pacific coast, to wit, the line in question, and thereby prevent and defeat the establishment and operation by your orator of said competing line.

And your orator shows further that the said defendant has actually constructed its said road across the greater portion of the Territory of New Mexico in and upon and very near to said located line of your orator without its consent and with full knowledge and in fraud of your orator's rights in the premises, well knowing of the

active operations of your orator in the completion of its road through the State of Texas as aforesaid and in the direction of said designated line in New Mexico and with full knowledge that your orator was moving rapidly with its road westward on its designated route; yet said defendant has hurried its work forward for the fraudulent and illegal purpose of occupying your orator's line and to exclude your orator therefrom and of preventing your orator from all use and enjoyment of its said lands, privileges, and immunities, and is rapidly completing the same, and will, unless restrained by the interposition of this court, continue to occupy the same and practically prevent your orator from occupying any part thereof, and will in effect forever exclude your orator from any and all use and enjoyment of the lands and every part thereof so granted as aforesaid to your orator by the U. S. Government and so reserved from sale by the Department of the Interior; and your orator further shows to your honors that as such points as the line of said defendant's road is not located and constructed on or in close proximity to the said line of your orator, as located,
47 designated, and filed in the Department of the Interior, yet the said defendant, to injure and oppress your orator, has located and constructed its said railroad the entire distance across the Territory of New Mexico, actually within the line of and upon the reservation of your orator in said Territory—that is to say, inside of the boundaries of the lands so set apart to your orator and specially withdrawn from sale by the Department of the Interior, and the constructed line of said defendant has in fact so far encroached on your orator's reservation as to actually occupy a large portion of the same without any legal or equitable right so to do and without the consent of your orator and to its irreparable injury, which, if persisted in, as it threatens to and will do, unless said defendant be restrained by this court, all of said lands and all said reservation now the property of your orator will, to all intents and purposes, become lost and valueless to your orator, and your orator will be practically and essentially prevented from ever hereafter extending its said road to the Pacific ocean, as was originally contemplated by its charter, and its franchises will be rendered comparatively valueless.

The line occupied by defendant is substantially as follows: Beginning at a point on the western boundary line of said Territory of New Mexico on said 32d parallel of north latitude about four to six miles south of the above-mentioned beginning point of your orator's designated and located line and within the limits of said reservation at or near a place called Stein's pass, thence running in a northeasterly direction and approaching your orator's exact line and running nearer and nearer thereto until it crosses the same, and thence northeasterly to a point near Ralston, about eight miles north of the said Leitendorf's Wells; thence in a southeasterly direction, approaching nearer and nearer to your orator's said line until it again crosses the same
48 and proceeding — said southeasterly direction to a point a few miles south of said Soldiers' Farewell and about eight miles

south of your orator's said line; turns again in a northeasterly direction and, approaching nearer and nearer, again crosses your orator's said line, and thence proceeding eastwardly and almost touching your orator's line about the new town of Deming, and thence to the Rio Mimbres, and crossing the same about four miles above the place where your orator's line crosses said river, and thence running alongside of your orator's said line, not more than four miles from same at the farthest point, for more than fifty miles, until it strikes the eastern boundary of New Mexico, on the Rio Grande; and so by an inspection of said map, which is referred to, your honors will perceive that the said railroad of defendant encroaches upon and substantially occupies the whole of your orator's said designated line, practically monopolizes the same, and if not prevented by the court will exclude your orator from any practical or valuable use and benefit of the same. Your orator believes the above delineation of defendant's line is correct. Your orator instituted search in the Department of the Interior for a map or profile of defendant's said line, but did not find one, and now charges that none has been filed.

And your orator further shows to you- honors that it has in writing notified The Southern Pacific Railroad Company, defendant, that it is proceeding in violation of the law in building and constructing its line of road over and through your orator's right of way and land grant, and requested it to desist and refrain from interfering with said right of way or reservation; that your orator claimed by virtue of its exclusive rights and privileges the railroad, fixtures, structures, and appurtenances constructed by defendant and
49 requested defendant not to interfere with or further use or destroy your orator's franchise, and that said Southern Pacific Railroad Company of New Mexico has not complied with the reasonable request of your orator, as in justice and equity it ought to have done, but said defendant is still constructing and operating said line in violation of your orator's right. Copies of all said written notices given defendant before the filing of this bill will be filed on or before the hearing, marked Exhibit E.

Your orator further represents and charges that the construction of the railway line through New Mexico by defendant as aforesaid was and is a trespass upon the rights of your orator, and that your orator, being the owner in the manner herein stated of the land upon which the same is constructed and now being operated, is entitled to the railway, depots and depot property, and all other fixtures constructed and erected upon said lands by defendant, and your orator now here asserts to the court its rights to said property as well as its use and occupation, and invokes the aid of the honorable court to remove the defendant therefrom and place your orator in complete possession and control of all the said property under such orders of the court as may be consistent with law and the right and equity of the parties, and at the same time perpetually enjoin defendant and all parties claiming by, through, under, or with it from interfering with or using said property.

And your orator is advised and believes and therefore claims that

the aforesaid charter, a copy of which is annexed as Exhibit D, and the rights that said defendant pretends to claim under it, in so far as the same infringes, violates, disregard, impair, or destroy the rights, privileges, and immunities of your orator in and to the land grant or land reservation of your orator or the exclusive
50 right of your orator to patent the alternate sections of land in said reservation, do impair the obligation of contracts solemnly made and entered into by and between the United States and your orator, and that all of the acts and doings of said defendant in pursuance of any pretended rights under said charter are contrary to law and are in so far null and void as to confer upon it no right whatever to use, maintain, operate, own, or claim any part or portion of the railway it has constructed over, upon, and along your orator's located and established line, and that the continuation of the acts and doings of the said defendant as above set forth are contrary to equity and good consciences and tend to the great wrong and injury of your orator.

But now so it is, may it please your honors, that the said defendant, combining and confederating with the said Southern Pacific Railroad Company of California and with the owners of said railroad and divers other persons to your orator at present unknown, whose names when discovered your orator prays if necessary may be made parties hereto, pretending that said defendant has a lawful right to occupy defendant's said designated line of road and reserved lands, and thus to greatly injure and impair your orator's rights and franchises, has, as aforesaid, constructed its line nearly across the Territory of New Mexico upon your orator's line and within your orator's reservation, and has thus illegally and without competent authority practically monopolized said entire line and said reservation, shutting complainant off from the same; and the said defendant, in further fraud of your orator's rights, is hurriedly progressing in the work of construction, and, in face of the rapid approach of your orator towards said Territory of New Mexico with its line across the continent, is now building its said road towards the eastern
51 boundary of New Mexico in such haste as to show that — is the intention and purpose of defendant to occupy the whole of your orator's line and forever exclude your orator, so far as it is in the power of the defendant, from any and all use and enjoyment of its said line and of its said reservation, all of which acting-, doings, and pretenses *is* contrary to equity and good conscience and tend to the manifest wrong and injury and oppression of your orator.

The premises considered, your orator prays that said The Southern Pacific Railroad Company of New Mexico may be made defendant to this bill, and that all proper and necessary process issue requiring defendant to make answer thereto and to each and every allegation therein contained as fully as if particularly interrogated thereto, and especially that defendant make full, complete, and specific answers to all the following numbered interrogations as by the note hereunder written the said defendant *as* required to answer—that is to say :

1st. Whether or not the Southern Pacific Railroad Company of California and the Southern Pacific Railroad Company of Arizona and the Southern Pacific Railroad Company of New Mexico are not in truth and fact one and the same corporation, and whether they are not managed, controlled, and operated by the same persons having large interests in both companies; and,

2nd. Whether or not the same officers in effect, if not form, manage all of said companies, and their directors and principal stockholders in said roads the same in each company, and whether or not said companies are managed and controlled as one and the same, and if it is not the purpose and intention of the persons controlling said corporation that the same shall be operated on completion as one and the same line; and,

3rd. Whether or not said C. P. Crocker subscribed to 1,980 out
52 of 2,000 shares of said capital stock for himself or for the benefit of said Southern Pacific Railway Company of California, and whether or not said Southern Pacific Railroad Company of California paid the assessment of ten per cent. or reimbursed him for such assessment; and,

4th. Whether or not said Southern Pacific railroad of California, of Arizona, and of New Mexico, one or all of them, are not leased to and operated by and under the management of the Central Pacific railway, and whether or not the C. P. Crocker, president of the Southern Pacific railroad of New Mexico, is not the same C. P. Crocker, vice-president of the Southern Pacific railroad of California.

And your orator further prays that the said Southern Pacific Railroad Company of New Mexico be enjoined from further building, constructing, or in any manner continuing its work upon the unfinished portion of its said railroad at any and all points in said Territory of New Mexico in, upon, and near to the designated line of your orator in said Territory as above described and at all points within the boundary lines of your orator's said land reservation—that is to say, any and all places and points within a space of forty miles on each side of your orator's said designated and located line—and that said defendant be enjoined and restrained from operating, working, maintaining, or in any manner using its said railroad line already constructed or any fixtures, structures, or appurtenances thereto in any manner belonging at any and all points in said Territory of New Mexico wherever the same has been built, constructed, and finished and are now being used by defendant in, upon, and near your orator's said designated line of railroad and at any and all places within the said land reservation of your orator extending, as aforesaid, forty miles on each side of your orator's said designated railroad line, and, to that end, that writs of
53 injunction issue from your honors' court to be served upon the proper officer or officers of defendant (said corporation), enjoining defendant and all its agents, employees, laborers, and servants from doing and performing any act whatever in and towards the further construction of defendant's said unfinished road, and from doing and performing any act in working, running, or in any

manner operating any of said finished road as aforesaid or using or interfering with any fixtures, structures, building, or improvements erected by defendant in the construction of and for the use of its said railroad in said Territory and within the limits aforesaid, and that at the hearing hereof said injunction be made perpetual, and in the meantime that a temporary restraining order be issued until the time fixed by your honors for said defendant to show cause why the injunction prayed for herein should not issue.

That a receiver be appointed by the court to take into poesession all of said railway of defendant lying within the limits of your orator's reservation as aforesaid, both that part finished and unfinished, and all the improvements, fixtures, and structures thereto appertaining, to the end that said property may be managed, controlled, and properly cared for under the orders of the court until the final hearing hereof, with all proper orders, judgments, and decrees for the government of said receiver and the safe and proper custody and management of said property, and that said receiver be required to give bond and security for the faithful discharge of his duty, and at the hearing your orator prays that a decree be rendered divesting all the right and title which the defendant has or may have or claim in and to said railroad and all its fixtures, structures, improvements, and property of every nature and every part thereof in said Territory of New Mexico and
54 within the limits of your orator's said reservation and vest them in your orator upon such terms and conditions as the court may deem right and proper, having due regard to whatever rights and equities may be shown to properly belong to the parties hereto, both complainant and defendant, and that said Southern Pacific Railroad Company, its officers, agents, attorneys, and solicitors, be restrained from transferring, disposing, selling, or conveying said railroad or any part thereof pending the final hearing of this cause; that all orders and decrees be made transferring all said property to your orator and clothing your orator with the possession, control, and use of said property and every part thereof, and, to that end, that proper writs of restitution and possession issue to carry into effect said order and decrees of your honors' court; and if mistaken in its special prayer your orator prays for such other, further, and general relief as your orator may be entitled to in the premises, &c.

(NOTE.—The defendant is required to answer all the above special interrogatories.)

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By H. M. HERMAN, *Its Solicitor.*

JOHN P. DILLON AND
WAGER SWAYNE,
Of New York, of Counsel.
A. J. FOUNTAIN,
Mesilla, N. M.

STATE OF TEXAS, }
County of Dallas, } ss:

On this eleventh day of May, A. D. 1881, before me personally appeared John C. Brown, vice-president and one of the officers of the Texas and Pacific Railway Company, and made oath that he has read the above bill subscribed by its attorney and solicitor, and that he knows the contents, and that the same is true of his
55 own knowledge except as to matters of information and belief, and as to those matters he believes them to be true.

JNO. C. BROWN.

Sworn to and subscribed before me this eleventh day of May, 1881.

[NOTORIAL SEAL.]

S. E. WOLF,
Notary Public, Dallas County, Texas.

Filed in my office this — day of May, A. D. 1881.

GEORGE R. BOWMAN, *Clerk.*

Plaintiff then introduced and read in evidence on said trial the order to show cause, restraining order, and order appointing a receiver in accordance with the prayer of the said bill of complaint made by the Honorable Warren Bristol, judge of said third judicial district court, in said cause, in which said bill of complaint was filed, dated the 26th day of May, 1881; which said order is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, }
Territory of New Mexico. }

Third Judicial District Court.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Complainant, }
vs.
THE SOUTHERN PACIFIC RAILROAD OF NEW MEXICO, Defendant. }

To the Southern Pacific Railroad Company of New Mexico and your agents, officers, workmen, laborers, operatives, lessees, attorneys, and solicitors and to each and every of them, Greeting:

Whereas it has been represented to the Honorable Warren Bristol, associate justice of the supreme court of Territory of New Mexico and presiding judge of the district court of the third
56 judicial district of the Territory of New Mexico, on the part of The Texas and Pacific Railway Company, complainant, in its certain bill filed in said court against you, the said parties aforesaid, to be relieved touching the matters and things therein complained of, in which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actions and doings in the premises are contrary to equity and good conscience:

In consideration thereof and for the convenience of counsel and

the parties hereto you are hereby commanded to show cause at my chambers, in the city of Santa Fé, New Mexico, on the twenty-fourth day of June, A. D. 1881, at four o'clock p. m. of said day, why the restraining order hereby allowed and the receiver hereby and herein appointed should not be continued until after the final hearing of the bill as prayed for in said bill, and in the meantime you, the said Southern Pacific Railroad Company of New Mexico, your agents, officers, workmen, laborers, operatives, attorneys, solicitors, and lessees, and each and every of you, are commanded to absolutely desist and refrain from occupying, using, operating, maintaining, and constructing a railroad through the limits of the land grant of said Texas and Pacific Railway Company in the counties of Grant and Doña Aña, in the Territory of New Mexico, or in any manner aiding or abetting or encouraging others to do any of these things, except as hereinafter provided by this order, until this honorable court in chancery shall make other order to the contrary; and whereas said Texas and Pacific Railway Company in and by said bill of complaint further show that said Southern Pacific Railroad
57 Company of New Mexico has trespassed on its right of way and, in violation of its rights, constructed its line of railroad on, over, and through its reservation and on its located line or near or parallel thereto, and claims the same, and demands possession thereof upon such equitable terms as to this court shall seem meet; and whereas said right, title, and estate of said Southern Pacific Railroad Company of New Mexico is in dispute, and in order that said restraining order may be enforced and carried into effect without interfering with the public wants, and that there shall be no cessation of the running, constructing, and operating of said line of railroad through the said counties of Grant and Doña Aña until the further order of this court in the premises:

It is therefore hereby ordered that Simon B. Newcomb be, and he is hereby, appointed receiver in equity of the estate, interest, and effects of the Southern Pacific Railroad Company of New Mexico, including its road-bed, rolling stock, depots, stations, section-houses, and other property connected therewith; to take charge of all and singular thereof; to operate, manage, and control the same under the order of this court; and said receiver has liberty to employ all such agents and servants under him, whether servants or agents of said defendant or otherwise, as he shall deem useful and expedient and to pay them a proper and reasonable compensation for their services out of the usual proceeds and revenue of said Southern Pacific Railroad of New Mexico; and the said Southern Pacific Railroad Company and its agents, employees, operatives, lessees, workmen, solicitors, and attorneys and each and every of them are hereby required and ordered to deliver to said receiver all and singular the property, effects, control, and possession of said Southern Pacific Railroad Company of New Mexico, in the Territory of New
58 Mexico, east of the boundary line of the Territory of Arizona and west of the boundary line of the State of Texas, with all the books, writings, documents, vouchers, and papers relating thereto; and said Southern Pacific Railroad Company of New

Mexico, its officers, agents, and employees, lessees, attorneys, and solicitors, are restrained and enjoined from conveying, selling, transposing, or in any manner disposing of or encumbering any of the estate, property, or effects of whatever kind or nature aforesaid, except to deliver them into the hands of said receiver; and said receiver is required to hold all the property, estate, and effects as aforesaid and the proceeds or revenue thereof, subject to the order and direction of this court; and said receiver is required to file in the office of the clerk of this court every month, under oath, a true account of all his receipts and disbursements; and either party or said receiver may apply from time to time to the court for further directions, as occasion may require; and it is further ordered that said receiver execute and file with the register in chancery of this court a good and sufficient bond in the penal sum of seventy-five thousand dollars for the faithful discharge of his duties as such receiver; and it is further ordered that a copy of said bill filed in this court, without the exhibits, be served upon said defendant, with the order, within twelve days from this date.

(Signed) WARREN BRISTOL,
Associate Justice of the Supreme Court of the Territory of New Mexico and Presiding Judge of the 3rd Judicial District Court Thereof.

Dated at chambers, in Mesilla, this 26th day of May, A. D. 1881.

Filed in my office this 26th day of May, A. D. 1881.
GEORGE R. BOWMAN, *Clerk.*

59 Plaintiff then further introduced and read in evidence on said trial the second amendment to the said bill of complaint which was filed in said cause on the 9th day of July, A. D. 1881, and is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Territory of New Mexico, }

In the District Court of the Third Judicial District of New Mexico.

THE TEXAS AND PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, Defendant.

At this day comes the complainant aforesaid and in accordance with equity rule 39 of said court amends its said bill of complaint filed in this court on the 26th day of May, A. D. 1881, as follows:

Second Amendment.

By inserting after the words "requested by your honor," at the end of the first paragraph on the fourth page, the following:

Said map being as required by and in accordance with sec. 12 of

said act, but the same did not purport to show the definite and fixed location of the road as required by the laws of Congress and the rules and regulations of the Department of the Interior thereunder, but was a map showing the general route of the road as near as then might be in accordance with 12th section of the charter, and said map was by the Secretary received and filed as such map, and the Commissioner of the Land Office, under the direction of the Secretary of the Interior, ordered the lands to be withdrawn pursuant to the requirements of said section twelve; all of which
60 will more fully appear by an examination of the letter hereto annexed, marked "Exhibit B."

And at the end of the first paragraph, on page four of the amendment, the said bill, after the words "in that behalf," and said contract or contracts were and are illegal.

And after the last paragraph on said fourth page of said first amendment the following paragraphs:

And your orator, protesting that it has neither the right or power to abandon or surrender the grant to and trusts imposed upon your orator by its said charter to defendant, or to refrain from constructing, having, owning, and maintaining the railway in its charter specified, and from resisting the construction of railroads alongside thereof, and further protesting that the defendant wrongfully and unlawfully entered upon the right of way granted by Congress to your orator and constructed a railroad and telegraph line upon said right of way in the Territory of New Mexico, and not admitting, but denying, its liability at law or in equity to compensate the defendant for its expenditures voluntarily made in the construction of said railroad and telegraph line for the sake of peace and to be immediately invested with the management and operation of said railroad and telegraph line in the Territory of New Mexico, hereby offers to pay without delay the defendant's necessary costs of construction of said railroad and telegraph line upon the decree of the court confirming to your orator the full right to the control — operation of said railroad and telegraph line constructed by said defendant, free and clear of all claims of the defendant, its assigns, mortgagees, lessees, or other incumbrances, so that your orator may have and enjoy all said railroad and telegraph property and the premises upon which the same is situate as of the first estate, and your
61 orator here offers to deposit in this court, or in such other place as your honor may direct, subject to the order and control of this court, one million dollars in lawful money, or with bonds of the United States, as your honor may direct, to secure the performance of the aforesaid offer or of any order or decree that your honor make in the premises touching or relating to this offer.

And your orator shows that on the 21st day of June, A. D. 1881, in New York, your orator offered to the defendant to pay it the reasonable and necessary cost in and about the construction of said railroad and telegraph line, as will more fully appear by an inspection of the copy of said offer hereto annexed, which said offer was made, as your orator avers, with the understanding that upon payment of the money offered said property should be free and clear

of all claims of defendant and of any and all parties claiming by, through, or under the defendant.

And your orator states and further shows to your honor that the offers heretofore and hereby made are made for the purpose of obtaining a speedy and peaceful settlement of the matters and things alleged by your orator, but your orator states that should said defendant refuse the offer herein and hereby made and persist in experimenting as to its rights by litigation your orator reserves the right and will insist that the result of the litigation shall settle the rights of the parties irrespective of these offers.

Copy of Offer.

NEW YORK, *June 21st*, 1881.

To the Southern Pacific Railroad Company in New Mexico:

The said company above named having constructed its road upon and along the right of way of the Texas Pacific Rail-
62 way Company and along, upon, and across the lands of the said last-named company granted to it by the act of Congress of March 3rd, 1871, and within the lands specially reserved under said act for the Texas and Pacific Railway Company, all of which has been willfully done without right and without license or consent of said Texas and Pacific Railway Company and in violation of its rights, and as trespassers upon the right of way, lands, and reservation: Now, the said Texas & Pacific Railway Company, without waiving for any other purpose any rights in the premises, hereby offer to pay to said Southern Pacific Railway Company or its assigns the free value of all moneys expended in the construction of said line of road through the Territory of New Mexico as soon as you will furnish an account of the money you have expended and the value of such expenditure by you can be ascertained. This offer shall not affect or prejudice the existing rights and equities of the Texas and Pacific Railway Company until such time as the said Southern Pacific Railway Company of New Mexico shall accept the same.

(Signed) JAY GOULD,
President Texas & Pacific Railway Company.
JNO. C. BROWN,
HENRY M. SHERMAN,
Solicitors for Complainant.
JOHN F. DILLON,
WAGER SWAYNE, of New York,
JOHN P. USHER,
A. L. WILLIAMS, of Kansas,
JOHN C. BROWN, of Tennessee,
BREEDEN & WALDO AND
A. FOUNTAIN, of New Mexico,
Of Counsel.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

63 On this 27th day of June, A. D. 1881, before me personally appeared John C. Brown, vice-president and one of the officers of the Texas and Pacific Railway Company, and made oath that he has read the foregoing amendment to the original and amended bill subscribed by its attorney and solicitor, and that he knows the contents, and that the same is true of his own knowledge except as to mat-ers of information and belief, and as to those matters he believes them to be true.

Sworn and subscribed before me this 27th day of June, 1881.

F. W. CLANCY,
Clerk of the District Court, First District,
Territory of New Mexico,
By H. S. CLANCY, *Deputy.*

Plaintiff then further introduced and read in evidence on the trial of said cause the final decree which was rendered in said cause between the Texas and Pacific Railway Company and the Southern Pacific Railroad Company, it being the same suit in which the foregoing bill of complaint was filed; which said decree is in the words and figures following, to wit:

District Court of the Third Judicial District of New Mexico.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY (OF New Mexico), The Southern Pacific Railroad Company (of Arizona), The Southern Pacific Railroad Company (of California), The Los Angeles and San Diego Railroad Company, and The Central Pacific Railroad Company. } Final Decree.

This cause coming on to be further heard at this term, the Texas and Pacific Railway Company — by Breeden & Waldo, its at-
64 torneys, and the Southern Pacific Railroad Company (of New Mexico), the Southern Pacific Railroad Company (of Arizona), the Southern Pacific Railroad Company (of California), the Los Angeles and San Diego Railroad Company, and the Central Pacific Railroad Company appeared by Catron and Thornton, their counsel.

And it appearing to the court that the parties to this cause other than the Los Angeles and San Diego Railroad Company and the Central Pacific Railroad Company had, under date of the 26th day of November, A. D. 1881, made and entered into an agreement in respect thereto, a copy of which is hereto attached, marked A;

And it appearing that said agreement had been ratified and confirmed by all of the corporations on whose behalf it had been executed and by all of the parties hereto; and thereupon and in consideration thereof, and by consent of each of the parties to the cause

hereinbefore named, it was ordered, adjudged, and decreed as follows:

That the entire railway of the Texas and Pacific Railway Company and the entire railroad of the Southern Pacific Railroad Company of New Mexico, and of the Southern Pacific Railroad Company of Arizona, and of the Southern Pacific Railroad Company of California, and of the Los Angeles and San Diego Railroad Company, and the Central Pacific railroad between Goshen and San Francisco, shall each be operated and used in perpetuity for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line, and that the gross earnings from all through business passing from one of said company's railway lines of the other shall be divided between them in proportion to the distance hauled by each, with equitable
65 and reasonable allowances to each for terminal expenses not to exceed the current charges on similar business handled by the Union Pacific Railway Company and the Central Pacific Railroad Company at San Francisco, and that no terminal charges elsewhere by either of said parties hereto shall exceed those at San Francisco.

And it further appearing to the court that the said Texas and Pacific Railway Company has, among other things, conformably to the said agreement, duly executed an instrument to the Southern Pacific Railroad Company (of New Mexico), whereby it has granted, remised, released, and quitclaimed allits right, title, interest, claim, demand, and estate in and to the way, right of way, and railroad constructed by the Southern Pacific Railroad Company of New Mexico (the right and title to which, in New Mexico, is in controversy in this suit), and also in and to certain lands of the said Texas and Pacific Railway Company, a draft of which said instrument is hereto annexed, marked B, and which describes the premises thus granted, remised, released, and quitclaimed as follows:

All its right, title, interest, estate, claim, and demand of, in, and to all that certain strip of land commencing on the boundary line between the Territories of Arizona and New Mexico, at a point where a certain railroad constructed by the Southern Pacific Railroad Company (of Arizona) and the Southern Pacific Railroad Company (of New Mexico) crosses the same, thence in a generally eastern direction across said Territory of New Mexico to the middle thread of the Rio Grande, at or near El Paso, at the place where the railroad of the said Southern Pacific Railroad Company of New Mexico crosses the said Rio Grande, said piece or parcel of land being two hundred feet in width—that is to say, one hundred feet on each side of the railroad so as aforesaid built by said The Southern Pacific
66 Railroad Company of New Mexico, measuring from the middle line or thread between the track or rails of said railroad company—with all the right, title, and interest of the said The Texas and Pacific Railway Company of, in, and to all lands which have been occupied and are now occupied by the said The Southern Pacific Railroad Company of New Mexico or that said company may desire to occupy hereafter for station buildings, depots, ma

chine shops, side tracks, turnouts, and water stations, not exceeding in amount twenty acres for each station, to the extent of one station for each ten miles of said road, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said The Texas and Pacific Railway Company of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said The Southern Pacific Railroad Company (of New Mexico), its successors and assigns forever: Provided, however, that this conveyance is not to affect the rights, privileges, and easements in, to, and over the said above-described premises reserved, conceded, and established to and in favor of the said grantor by said agreement of November 26th, 1881, and the said decrees;

And it further appearing to the court that the said Texas and Pacific Railroad Company has, conformably to said agreement, duly executed an instrument to the Southern Pacific Railroad Company
of Arizona, whereby it made like grants, remises, releases,
67 and quitclaims in respect of its right, title, interest, claim, demand, and estate in and to the way, right of way, and railroad constructed by the Southern Pacific Railroad Company of Arizona (the right and title to which in Arizona is in controversy in the district court for the second district of Arizona, sitting in the county of ——), and also its right, title, interest, and estate in and to certain lands of the Texas and Pacific Railway Company in Arizona, as will more fully appear by reference to said instrument, a draft of which, marked C, is hereto annexed;

And it further appearing to the court that a like instrument was executed by the Texas and Pacific Railway Company to the said Southern Pacific Railroad Company and the said Los Angeles and San Diego Railroad Company, a corporation of the State of California;

And it further appearing that each of the said instruments was executed by the Texas and Pacific Railway Company for the considerations therein severally stated, and also in consideration that the said rights, privileges, and easements hereinbefore mentioned should be reserved, conceded, and established as a perpetual right, privilege, and easement appertaining to the railroad of each of said companies above named, parties to this suit, in and over the road or roads of the other, as herein stated: Thereupon, on consideration thereof, and by consent of each of the parties to this suit, it is also hereby ordered, adjudged, and decreed that the foregoing right, privilege, and easement shall be, and the same are hereby, decreed and established as a perpetual right, privilege, and easement appertaining to the railroad of the Texas and Pacific Railway Company in and over the railroad of the Southern Pacific Railroad Company of New Mexico in and over the railroad of the Southern Pa-

cific Railroad Company of Arizona, and the Southern
68 Pacific Railroad Company of California, and the Los Angeles and San Diego Railroad Company, throughout their entire extent, and the Central Pacific Railroad between Goshen and San Francisco, with the limitation hereinafter stated, and a reciprocal right, privilege, and easement appertaining to each of the railroads of the companies last named in and over the railroad of the Texas and Pacific Railway Company throughout its entire extent, is hereby decreed and established; and, by the consent of parties, it is accordingly ordered, adjudged, decreed, and established as a right, privilege, and easement appertaining to the way, right of way, and railroads of said companies in, to, and over the way, right of way, and railroads of the other; that each of said railroads shall be operated and used by the said companies respectively, their successors and assigns, in perpetuity, for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line, and that the gross earnings from all through business (meaning by "through business" all traffic carried to and from terminal, common, or competitive points—any point upon the railways of the parties to said agreement dated November 26th, 1881 that may be reached directly or indirectly by any railroad competitive to either of said roads is a "competitive point") passing from one of said company's lines of railway to railway lines of the other shall be divided between them in proportion to the distance hauled by each, with equitable and reasonable allowances for terminal expenses as aforesaid: Provided, and it is expressly considered, ordered and adjudged that, excepts as to the rights, privileges, and easements aforesaid, the said Texas and Pacific Railway Company has no right, title, estate, claim, or demand at law or in equity in or to the way, right of way, and railroad, with its appurtenances, con-
69 structed by the Southern Pacific Railroad Company of New Mexico in the Territory of New Mexico, or in or to the way, right of way, and railroad, with its appurtenances, constructed by the Southern Pacific Railroad Company of Arizona in the Territory of Arizona.

The aforesaid decree is made to carry out the provisions in this behalf of said agreement dated November 26th, 1881, which is hereby made a part of this decree and by consent of the parties and upon consideration by the court is hereby ordered and decreed to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown, and said decree does not otherwise affect or interfere with the provisions of said agreement.

It is further ordered, adjudged, and decreed that when the Southern Pacific Railroad of California is completed by a continuous line of its own from Yuma to San Francisco, without the intervention of a ferry, that this decree shall cease to operate either for or against the Central Pacific Railroad Company.

It is further ordered, adjudged, and decreed that the injunction order and the order for the appointment of a receiver, heretofore made herein, shall be vacated and set aside, and that each party hereto shall pay the costs made by it respectively, and each party

hereto in open court waives any right of appeal herefrom and releases all errors herein.

It is further considered, ordered, and adjudged that the several parties to this suit be allowed to withdraw all moneys deposited or paid into court by them respectively pursuant to the pleadings or orders of the court herein; and it is further considered, ordered, and adjudged, by the consent of the parties hereto, that this decree is not to be operative or go into effect until a similar decree is entered in the case of the Southern Pacific Railroad Company (of
70 Arizona) against the Texas and Pacific Railway Company in the suit pending between the said companies and others in the district court of the second judicial district of Arizona. When both of the said decrees are entered, then each and both of said decrees are to be and become immediately operative and in full force and effect.

(Signed) WARREN BRISTOL, *Judge.*

We consent to the entry of the foregoing decree.

JOHN F. DILLON,
WAGER SWAYNE,
Attorneys for the Texas and Pacific Railway Co.
JAS. H. STORRS,
Of Counsel.

Plaintiff then further introduced and read in evidence on said trial a memorandum of agreement which was made and entered into on the 26th day of November, A. D. 1881, between Collis P. Huntington, for and on behalf of himself and his associates and for and on behalf of said plaintiff company and other railroad companies therein mentioned, and Jay Gould, for himself and on behalf of his associates and for and on behalf of the Texas and Pacific Railroad Company and other companies therein mentioned; which said agreement is in the words and figures following, to wit:

Memorandum of an agreement made this twenty-sixth day of November, A. D. 1881, in the city of New York, between Collis P. Huntington, of the city of New York, for and on behalf of himself and his associates and for and on behalf respectively of the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of New Mexico, the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Rail-
71 road Company of Texas, and the Louisiana Western Railroad Company of Louisiana and any extensions thereof owned or controlled or hereafter to be owned or controlled by the said Huntington or the said railroad companies above named or any of them, of the first part, and Jay Gould, of the city of New York, for himself and on behalf of his associates and for and on behalf respectively of the Texas and Pacific Railway Company, the International and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad Company of Texas and for and on behalf of the Missouri Pacific Railway Company, the Missouri, Kansas and

Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company, witnesseth:

That whereas the said Huntington and his associates own and control a majority interest in the said companies for whose behalf he acts as aforesaid;

And whereas the said Gould and his associates own and control a majority interest in the companies for whose behalf he acts as aforesaid;

And whereas divers differences have arisen and exist between the three Southern Pacific Railroad Companies above named and the said Galveston, Harrisburg and San Antonio Railway Company, on the one hand, and the Texas and Pacific Railway Company, on the other;

And whereas, in respect to some of the said differences, various suits are now pending in the courts of Arizona, New Mexico, and Texas, threatening long-continued, troublesome, and expensive litigation;

And whereas the continuance of such litigation is injurious to all of said companies and, incidentally, to the public interest, so far as the business of said lines is concerned;

72 And whereas said differences and litigation have been found, upon conference and deliberation, to be susceptible of amicable adjustment, as in this contract provided;

And whereas the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company own and control lines of railroad connecting with the road of the Texas and Pacific Railway Company and are interested in the subject-matter of this agreement, except so far as pertains to the direct controversies in the pending suits between the said Southern Pacific Railroad Companies and the Galveston, Harrisburg and San Antonio Railway Company, on the one side, and the Texas and Pacific Railway Company, on the other:

Now, therefore, the parties hereto, with a view permanently to settle all controversies between said companies of the first part or any one or more of them and the companies of the second part or any one or more of them, and to prevent future controversies, and in consideration of the premises and of the mutual covenants hereinafter contained, the parties hereto do covenant, promise, and agree each with the other as follows:

I.

Mutual Agreement to Join Tracks East of El Paso.

It is mutually agreed by and between the parties hereto that the Texas and Pacific Railway Company shall continue the construction of its road now being built in Texas westward until its continuous track shall approach the track of the Galveston, Harrisburg and San Antonio Railway Company, which is now building eastwardly from El Paso along the valley of the Rio Grande, until the two shall meet and be connected so as to form one through line

to the Pacific ocean, the point of junction to be agreed upon
73 between the respective chief engineers, who shall select a suitable place for such junction as nearly as practicable intermediate between the ends of the tracks of the said roads as now laid as aforesaid. This point of junction is hereafter referred to in this instrument as the "junction."

II.

Relinquishment of Texas and Pacific Claims in Territories.

The Texas and Pacific Railway Company shall release, relinquish, and convey, in such form as counsel for both parties may agree and advise, all of its right, title, interest, and estate in and to the railway constructed by the said Southern Pacific railroad companies of Arizona and New Mexico, and which railways, in suits now pending, are claimed by the said Texas and Pacific Railway Company to be constructed upon its right of way and to be its property, which claims are denied by the said Southern Pacific railroad companies.

III.

Transfer of Land Grant West of El Paso to Southern Pacific Companies.

The party of the second part further covenants, promises, and agrees that the Texas and Pacific Railway Company being entitled under the 9th section of the act of Congress of March 3d, 1881, whereby it was incorporated, to a land grant from the United States, as shown by the said act (which land grant was made to the said Texas and Pacific Railway Company, its successors and assigns), shall execute a deed whereby it shall in terms assign, transfer, and make over the said land grant, in such form as counsel for both parties may advise, to the said Southern Pacific Railroad Companies respectively, and shall allow its corporate name to be used,
74 or, at the request and expense of the said assignees, shall take such steps as the said assignees may require in order to make the said land grant available to the said assignees, and if the said assignees shall desire to procure any congressional ratification of such transfer, the Texas and Pacific Railway Company and the said second parties shall not hinder nor embarrass such action, but shall promote the same in any reasonable way in its or their power.

IV.

Texas Pacific to Cede Franchises West of El Paso.

The party of the second part further agrees that the Texas and Pacific Railway Company shall execute an instrument whereby it undertakes to cede and make over all its corporate rights and franchises west of El Paso to the said Southern Pacific Railroad Companies respectively, their successors and assigns, as the case may be. Any congressional ratification thereof shall contain a provision that

they are acquired bythe said Southern Pacific Railroad Companies or said assigns subject to the right of the Texas and Pacific Railway Company and a reciprocal right on the part of the said Southern Pacific Railroad Companies to have the entire roads of each and all of said companies operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line; and the said Texas and Pacific Railway Company shall convey to the Southern Pacific Railroad Company of California, or to such company as may be designated by the party of the first part, all of its right, title, and interest to any and all property, rights, and franchises in the State of California and in and near the city of San Diego.

75 V.

Undertakings of Party of the First Part.

In consideration of the foregoing agreements, and especially the agreement of the Texas and Pacific Railway Company relinquishing, releasing, and conveying its right, claim, title, interest, and estate in and to the road and way and right of way on which the railroad is constructed in New Mexico and Arizona, the said Huntington, for himself and for the said railroad companies on whose behalf he acts, covenants, promises, and agrees to and with said Gould and with each of the companies on whose behalf he acts as follows:

Roads to be Operated as One Through Line and Earnings Divided.

1st. That he will on his part procure or cause to be procured an agreement that the road of the Texas and Pacific Railway Company and the road of the Southern Pacific Railroad Companies shall be operated, as aforesaid, as one through continuous line, and that the gross earnings from all through business passing over one of said company's lines to the other shall be divided between them in proportion to the distance hauled by each, with equitable and reasonable allowances to each for terminal expenses, not to exceed the current charges on similar business handled by the Union and Central Pacific line, and no terminal charges elsewhere by either of the parties shall exceed those at San Francisco.

Rates and Joint Agents.

2nd. That the said companies of the party of the second part and each of them may establish offices and agencies at San Francisco, Los Angeles, San Diego, and all other ports and places on the Pacific coast and competing points on the Pacific slope reached by
76 the Southern Pacific railroads and their connections and contract for through business of all kinds, including freight and passengers, via the lines of the said railroads of the party of the first part, and said companies constituting the parties of the first part

shall carry all through business on as favorable terms as they carry for the Galveston, Harrisburgh and San Antonio Railway Company, the Atchison, Topeka and Santa Fé Railroad Company, the Union Pacific Railway Company, the Atlantic and Pacific Railroad Company, or any other connecting companies, not to exceed the *pro rata* per mile of the through rate, with allowance for terminal expenses as aforesaid, and that all through rates via this line between all points on the Pacific coast and competitive points on the Pacific slope and the East shall be at all times as low as by any other route; and if any dispute arises between the parties as to whether the through rate is as low as by any other route the agents of the parties of the second part shall have the right to make the through rates on west-bound business until such dispute shall be adjusted by arbitration, as herein provided. A reciprocal right in respect to east-bound business is in all respects to be accorded to the parties of the first part. To save expense and to prevent disagreement it is agreed that at the principal competing points in the East and West the soliciting agents shall be joint agents and be jointly appointed.

VI.

Mutual Agreement to "Pool" New Orleans and Galveston Traffic and Not to Discriminate Against Mississippi Termini.

It is further mutually agreed that all unconsigned business, meaning all business whereof the route has not been designated in advance, destined for points west of El Paso received by the said Texas and Pacific Railway Company shall be turned over to Gal-
77 veston, Harrisburg and San Antonio Railway Company at the junction or to the Southern Pacific Railroad Company at El Paso, as the case may be; and all such "unconsigned" business received by the Southern Pacific Companies and destined to places east of the "junction" reached by the Texas and Pacific railway and its connections north of Shreveport, La., and west of the Mississippi river shall be delivered to the Texas and Pacific Railway Company at the "junction" or at El Paso, as the case may be. The gross earnings on all business passing over either of these roads between El Paso or the junction and New Orleans shall be divided equally, and the gross earnings on all business passing over either of these roads between El Paso or the junction and Galveston shall be divided on the basis of two-thirds thereof to the Galveston, Harrisburg and San Antonio Railway Company and its connections and one-third thereof to the Texas and Pacific Railway Company and its connections, and the agents are to divide, as nearly as possible, such business between the two through lines, so that each shall do the proportion of business above allotted.

In the event that either of the said companies of the one party, at either of the termini herein mentioned, shall be unable or shall neglect or refuse for any cause to take the business and to perform the said service in the proportions above named, the company or companies of the other party shall be at liberty, so long as such dis-

ability continues, to take such business and perform said service and shall be entitled to receive the compensation therefor.

The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, the St. Louis, Iron Mountain and Southern Railway
78 Company, the International and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad Company shall severally take the through business any of them may have to do under this agreement between El Paso and any point on the Mississippi river without any discrimination as to rate or otherwise in favor of any line, road, or transportation company and with equal dispatch, and this provision applies to business destined to or coming from any railroad east of the Mississippi river.

There shall be no discrimination as to local business by any of the roads of either of the parties as against those of the other party, it being understood that the term "through business" as used in this agreement applies to traffic carried to and from terminal, common, or competitive points, and any point upon the lines of the railways of the parties hereto that may be reached directly or indirectly by any railroad competitive to either of said roads is understood to be a competitive point.

VII.

Louisiana Western to Use Texas Pacific Track into New Orleans.

The party of the second part further covenants and agrees that the Texas and Pacific Railway Company shall, at the request of the said Huntington, in the event that it shall become desirable in his judgment to connect the present eastern teminus of the Louisiana Western railroad at Vermillionville by a line of railroad therefrom to the Mississippi river so as to intersect and effect a junction with the road of the New Orleans Pacific Railway Company (now consolidated with and forming part of the Texas and Pacific Railway Company) at or in the vicinity of Bayou Goula, take the business of such road and its connections between such point of intersection and New Orleans promptly with-
79 out undue preference or discrimination, as nearly as may be, in the time and manner of its own traffic (details of which shall be settled by the respective superintendents or by arbitration as herein provided for the settlement of disputes arising hereunder), or, at the option of said Huntington, the said Louisiana Western Railroad Company or any extension thereof shall have the right to a perpetual joint use for the passage of its trains from the point of intersection to the terminus of the Texas and Pacific railway opposite New Orleans equally with the Texas and Pacific Railway Company upon such regulations as shall be prescribed by their superintendents, paying therefor six per cent. per annum semi-annually upon $10,000 per mile and one-half of the cost of maintenance, renewals, and taxes. In the event of such extension of said line of road to Bayou Goula or any intersecting point with the Texas and Pacific railway upon the Mississippi river, then Bayou

Goula or such intersecting point shall be treated in reference to the division of business and earning the same as New Orleans.

VIII.

Mutual Agreement Not to Duplicate Roads of Each Other.

It is further mutually covenanted and agreed by and between the parties hereto that while the running and pooling arrangements and agreements herein are kept and observed by the parties of the first part the parties of the second part shall not build nor promote, except through the executive committee, in the manner hereinafter provided, directly or indirectly, the building of any other parallel or through line from the junction or any point west thereof to the Pacific ocean or to the tidal waters thereof or any line duplicating in whole or in part or the building of any line to connect
80 with any other line so as to duplicate in whole or in part the said line or roads of the said parties of the first part; and the parties of the first part shall not build nor promote, except through the executive committee, in the manner hereinafter provided, directly or indirectly, the building of any road west of the Mississippi river which shall be parallel to or duplicate in whole or in part the said lines or roads of the party of the second part or the building of any line to connect with any other line so as to duplicate in whole or in part the said lines of roads of the said party of the second part.

IX.

Mutual Agreement not to Purchase or Control Competing Roads Except Through an Executive Committee.

The parties hereto further agree each with the other that there shall be an executive committee, consisting of C. P. Huntington and Jay Gould and such third person as they may select, and in the event that either of the parties hereto subscribing or their associates shall be offered, within the period covered by this agreement, the one-half stock interest in the Atlantic and Pacific Railroad Company held by the Atchison, Topeka and Santa Fé Railroad Company or its equivalent in bonds separately or in conjunction with securities of the said Atchison, Topeka and Santa Fé Railroad Company or any securities, though less than one-half, which may lead to the control of said companies or either of them, such offer shall be submitted to the said executive committee, and no such purchase thereof shall be made, directly or indirectly, except with the sanction of said committee.

In like manner, should the half interest in said Atlantic and Pacific Railroad Company held by the St. Louis and San Fran-
81 cisco Railroad Company be offered either separately or in conjunction with securities of the said St. Louis and San Francisco Railroad Company or any securities, though less than one-half, which shall lead to the control of said companies or either of them, including the St. Louis and San Francisco Railroad Com-

pany, such offer shall be referred to the said executive committee, and no such purchase shall be made, directly or indirectly, except with the sanction of said committee.

And in the event that either or both of said interests are acquired, or the control of said roads or either of them, including the St. Louis and San Francisco railroad, is achieved in any manner, such road shall be transferred to and held and managed by said executive committee as may be determined for the interest and benefit of the parties hereto.

X.

Road between Junction and El Paso to be Jointly Used by Galveston, Harrisburg & San Antonio Railway Company and by Texas and Pacific Company.

And the said Huntington further covenants, promises, and agrees that the Galveston, Harrisburg and San Antonio Railway Company shall execute an agreement to conduct for and in consideration of a *pro rata* share, according to haul, of the charges as aforesaid all of the business of the Texas and Pacific Railway Company between Junction and El Paso promptly, without undue preference or discrimination, as nearly as may be in the time and manner of its own traffic (the details to be settled by the respective superintendents or by arbitration, as herein provided), or that, at the option of the Texas and Pacific Railway Company, it shall have the right
82 to a perpetual joint use of the road and telegraph between Junction and El Paso equally with the Galveston, Harrisburg and San Antonio Railway Company upon such regulations as may be prescribed by their respective superintendents, paying therefor six per cent. per annum semi-annually upon $10,000 per mile and one-half of the cost of maintenance, renewals, and taxes, and in the event of such election by the Texas and Pacific Railway Company the interchange of business above provided for in this contract shall be made at El Paso.

XI.

Galveston, Houston and Henderson Railroad to be Used by Both Parties.

It is further agreed that the Galveston, Houston and Henderson Railroad Company shall conduct all of the business of the Galveston, Harrisburg and San Antonio Railway Company and of the Texas and New Orleans Railroad Company between Houston and Galveston promptly, without undue discrimination, as nearly as may be in the time and manner of its own traffic (the details to be settled by the respective superintendents or by arbitration, as herein provided for), or, at their option, the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, or either of them shall have the right to a perpetual joint use of the said road between Houston and Galveston equally with Galveston, Houston and Henderson Railroad Company or its successors as the same may be reorganized upon such regulations

as may be prescribed by their respective superintendents, paying therefor six per cent. per annum semi-annually upon $10,000 per mile and one-half of the cost of maintenance, renewals, and taxes, said payments to be made by one or the other of said companies, as they agree.

83

XII.

Central Pacific to Prorate between Goshen and San Francisco.

The said Huntington undertakes and guarantees to procure the assent of the Central Pacific Railroad Company to comply with the provisions hereof, so far as its line between Goshen and San Francisco constitutes a link in the operation of the through line in this agreement provided for, until the Southern Pacific railroad is completed by a continuous line of its own into San Francisco without the intervention of a ferry.

XIII.

Same Telegraph Company to do Commercial Business over Entire Routes.

And the party of the first part further agrees that the existing contracts with the Western Union Telegraph Company shall be extended for the further period of ten years, by which all commercial business, so far as the same can legally be done, shall be secured to the said telegraph company; but the terms thereof shall not be less favorable to the railroads represented by the party of the first part than the existing contract between the Central Pacific, Southern Pacific, and other railroad companies and the Western Union Telegraph Company. This, however, shall not be held to affect or disturb existing contracts east of San Antonio.

XIV.

Texas Pacific to Dismiss Suits or Enter Decrees by Consent and Relinquish Claims to Southern Pacific Railroads.

Whereas there is a suit pending in New Mexico between the Texas Pacific Railway Company and the Southern Pacific Railroad Company of New Mexico, and also a suit pending in Arizona
84 between the Southern Pacific Railroad Company of Arizona and the Texas Pacific Railway Company, in which suits the Texas and Pacific Railway Company claims the way and right of way on which the said Southern Pacific Railroad Companies have constructed a railroad through said Territories, which claim is disputed and denied by said Southern Pacific Railroad Companies, and nothing in this agreement shall be construed as an admission of such right;

And whereas the Texas and Pacific Railway Company claims the title to said road, which claims are disputed and denied by the Southern Pacific Railroad Companies;

And whereas the Texas and Pacific Railway Company has, by this agreement, relinquished and released to the said Southern Pacific

Railroad Companies all of its right, title, interest, and estate in and to the said way, right of way, and railroad constructed by the Southern Pacific Railroad Companies in New Mexico and Arizona;

And whereas the Texas and Pacific Railway Company is entitled, by its charter, to make "running arrangements" with any other railroad company or companies;

And whereas the consideration to the said Texas and Pacific Railway Company for the said relinquishment and release is the agreement of the said Southern Pacific Railroad Companies that the said road of the Texas and Pacific Railway Companies and the roads of the three Southern Pacific Railroad Companies and their connections shall be operated forever as one continuous through line as aforesaid, and that the gross earnings from all through business passing from one of said company's lines to the other shall be divided between them in proportion to the distances hauled by each, with allowances for terminal expenses as aforesaid:

85 Now, therefore, it is agreed that decrees may be entered in said suits in New Mexico and Arizona whereby the right of the Texas and Pacific Railway Company and the three Southern Pacific Railroad Companies to have their respective roads operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line, and the gross earnings from all through business passing from one of said companies' lines to the lines of the others divided between them in proportion to the distance hauled by each, with allowances for terminal expenses as aforesaid, shall be reserved, conceded, and established as a perpetual privilege and easement appertaining to the road of each of said companies in and over the road or roads of the others.

XV.

Right to Maintain Actions—Mutual Covenant as to Arbitration in Case of Disputes.

It is understood that either or any of the said several railroad companies, parties to this agreement, may maintain any action, either at law or in equity, against either, any, or all of the other railroad companies, parties to this agreement, to protect any right secured by this agreement, to specifically enforce the same, or to recover damages for the breach of any stipulation in this agreement affecting its interest, and that no objection shall be had or taken to any such action by reason of the non-joinder of parties as plaintiffs, and all clauses in this agreement contained are to be so construed as to secure this right.

It is further mutually agreed between the parties hereto that in case disagreements of any kind shall arise at any time between them or any two or more of the companies in whose behalf they respectively act as to any act or omission to act under this agreement

86 or as to the meaning of any clause or provision thereof, that, at the request of either of such parties, an arbitrator shall be appointed by each of the parties so disagreeing, and a third arbitra-

tor shall be chosen by the two so appointed, and the decision of said arbitrators or a majority of them, given after a hearing, of which both parties shall be duly notified and at which they shall have had an opportunity to be heard, shall be final and binding upon both parties as to the matter or matters in issue between them; and, in case of such arbitration, each party to this agreement hereby covenants for himself and itself, its successors and assigns, with each of the other parties to this agreement and its successors and assigns, that it will forthwith, upon the rendering of any decision as aforesaid, comply with and perform the requirements thereof; and, further, will pay any sum or sums of money which it may be required to pay by such award. A failure to appoint arbitrators or to comply with the award or decision shall be a breach of this contract.

Discontinuance of Suits and Relinquishment in Texas.

All suits between the said companies parties to this agreement, or any of them, except those in which decrees are to be entered as aforesaid, are to be discontinued as soon as practicable after the execution hereof.

And the Texas and Pacific Railway Company shall execute a conveyance, for the consideration sum of one dollar, to the Galveston, Harrisburg and San Antonio Railway Company, granting to it the necessary and convenient way and right of way and station grounds wherever the said railroad shall cross or be laid upon the lands of the Texas and Pacific Railway Company, whether
87 granted by the State of Texas or otherwise, and shall renounce, release, and relinquish all claim, title, or interest in and to the said railroad claimed or included in any suit or suits pending in said State. A release is to be procured from G. M. Dodge of right of way over any lands standing in his name in Texas.

The agreements and each of them herein are of perpetual obligation.

Exchange of Ratification by Companies.

The foregoing agreement shall be submitted by the respective parties thereto to the several boards of directors of the corporations which they respectively represent, and the same shall be accepted, adopted, ratified, confirmed, made, and declared by said several boards of directors to be the act and contract of their respective corporations, so far as the same severally affects them respectively; and thereupon each corporation shall deliver each to each other corporation certified copies of its proceeding in the premises, signed by the president and countersigned by the secretary thereof, and sealed with its corporate seal, within the ninety days from the date hereof.

In testimony whereof the said parties have hereunto set their hands, in the city of New York, in duplicate, on the day and year first above written.

C. P. HUNTINGTON.
JAY GOULD.

It is understood that when the said several companies shall have executed an exchange of ratifications as aforesaid the personal undertakings of Mr. Huntington and Mr. Gould shall *cause*.

C. P. HUNTINGTON.
JAY GOULD.

Plaintiff then further introduced and read in evidence a
88 deed of conveyance made and executed by the Texas and Pacific Railway Company to the Southern Pacific Railroad Company of New Mexico, dated January 18th, 1882, which is in the words and figures following, to wit:

NEW MEXICO:

"B," Referred to in the Attached Decree.

First Deed.

Know all men by these presents that the Texas and Pacific Railway Company, a corporation duly incorporated, organized, and existing under the laws of the Congress of the United States of America, for and in consideration of the sum of one dollar to it in hand paid by the Southern Pacific Railroad Company (of New Mexico), a corporation duly organized and existing under the laws of the Territory of New Mexico, the receipt whereof is hereby acknowledged and confessed, and for other valuable considerations mentioned and set forth in an agreement, in writing, dated November 26th, 1881, between Collis P. Huntington and Jay Gould in behalf respectively of said above-named grantor and grantee, and which has been duly ratified by the said grantor and grantee in their corporate capacity, and for the consideration mentioned and set forth in the decrees to be entered in the district court in New Mexico and Arizona, in pursuance of the fourteenth (XIV) article of said agreement of November 26th, 1881, has granted, remised, released, and quitclaimed, and by these presents does grant, remise, release, and quitclaim unto the said The Southern Pacific Railroad Company (of New Mexico), its successors and assigns forever, all its right, title, interest, estate, claim, and demand of, in, and to all that certain strip of land commencing on the boundary line between the Territories of Arizona and New Mexico, at a point where a certain
railroad constructed by the Southern Pacific Railroad Com-
89 pany (of Arizona) and the Southern Pacific Railroad Company (of New Mexico) crosses the same, thence in a generally eastern direction across said Territory of New Mexico to the middle thread of the Rio Grande, at or near El Paso, at the place where the railroad of the said Southern Pacific Railroad Company of New Mexico crosses the said Rio Grande, said piece or parcel of land being two hundred feet in width—that is to say, one hundred feet on each side of the railroad so as aforesaid built by said The Southern Pacific Railroad Company of New Mexico, measuring from the middle line or thread between the track or rails of said railroad company, with all the right, title, and interest of the said The Texas and

Pacific Railway Company of, in, and to all lands which have been occupied and are now occupied by the said The Southern Pacific Railroad Company of New Mexico, or that said company may desire to occupy hereafter for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not exceeding in amount twenty acres for each station, to the extent of one station for each ten miles of said road, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said The Texas and Pacific Railway Company of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said The Southern Pacific Railroad Company (of New Mexico), its successors and assigns forever: Provided, however, that this con-
96 veyance is not to affect the rights, privileges, and easements in, to, and over the said above-described premises, reserved, conceded, and established to and in favor of the said grantor by said agreement of November 26th, 1881, and the said decrees.

In testimony whereof the said The Texas and Pacific Railway Company has caused these presents to be signed by its president and countersigned by its secretary and its corporate seal to be hereunto affixed (pursuant to an order of its board of directors heretofore duly made and entered of record) on this 18th day of January, 1882.

[Seal T. & P. R. R. Co.]

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By JAY GOULD, *President.*

Sealed and delivered in the presence of—
GUY PHILLIPS.

Attest: C. E. LUTTERLEE, *Secretary.*

Plaintiff then further introduced and read in evidence a deed of conveyance made and executed by the said Texas and Pacific Railway Company to and in favor of the Southern Pacific Railroad of New Mexico, the Southern Pacific Railroad Company of Arizona, and the Los Angeles and San Diego Railroad Company, dated January 16th, 1882; which said deed, omitting the certificate of acknowledgement, is in the words and figures following, to wit:

West OF TEXAS:

"C," Referred to in the Attached Decree.

Second Deed.

This indenture, made on this the eighteenth day of January, A. D. 1882, between the Texas and Pacific Railway Company, a corpo-

ration duly incorporated and existing under an act of Con-
91 gress entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and the several acts of Congress supplementary thereto, party of the first part; and the Southern Pacific Railroad Company (of New Mexico), a corporation duly incorporated and existing under an act of the Legislative Assembly of the Territory of New Mexico entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved February 2d, 1878, party of the second part; the Southern Pacific Railroad Company of Arizona, a corporation duly incorporated and existing under an act of the Legislative Assembly of the Territory of Arizona entitled "General railroad incorporation act," approved February 14th, 1879, party of the third part; and the Los Angeles and San Diego Railroad Company, a corporation duly incorporated and existing under the laws of the State of California, party of the fourth part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar to it in hand paid by said parties of the second, third, and fourth parts, and for and in consideration of certain covenants, agreements, and undertakings to be kept, observed, and performed by said parties of the second and third part and the Southern Pacific Railroad Company, a corporation duly incorporated and existing under the laws of the State of California, contained in a certain agreement, bearing date on the 26th day of November, A. D. 1881, between Collis P. Huntington, acting for himself, his associates, and said Southern Pacific Railroad Companies, and Jay Gould, acting for himself, his associates, and said party of the first part, as well as certain other corporations in said agreement
92 named and mentioned, has granted, transferred, assigned, and set over, and by these presents does grant, transfer, assign, and set over, to said parties of the second, third, and fourth parts, their successors and assigns, severally as follows:

To the said party of the second part, its successors and assigns, all that certain right of way through the public lands of the United States and the right to take from the public lands adjacent thereto earth, stone, timber, and other material for the construction of a railroad thereon (said right of way being two hundred feet in width on each side of the railroad and the telegraph line described in the first section of said act of Congress of March 3, 1871), where said road passes over the public lands; also grounds for stations, buildings, workshops, wharves, switches, side tracks, turn-tables, water stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point, granted to said party of the first part by the eighth section of the said act of Congress of March 3, 1871, and also the right or franchise of the said party of the first part to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, from a point on the Rio Grande near El Paso westward on the most direct and eligible route, near the thirty-second

parallel of north latitude, granted to said party of the first part by the first section of said act of Congress, and also all lands granted to said party of the first part by the ninth section of said act of Congress to aid it in the construction of the railroad and telegraph line described in the first section of said act; so far and so far only as said right of way, said right to borrow material, &c., said land grant, and said right or franchise to construct and enjoy a railroad and telegraph line are severally included within the boundaries of New Mexico or were to be exercised and enjoyed by said party of the first part within said Territory.

93 To have and to hold the same and each and every thereof, with the appurtenances, unto the said party of the second part, its successors and assigns forever.

To the said party of the third part, its successors and assigns, all the right of way, the right to borrow materials, &c., the grant of land for station purposes, &c., the land grant, and the right or franchise to construct and enjoy a railroad and telegraph line as aforesaid by sections 8, 9, and 1 of said act of Congress of March 3, 1871, granted to said party of the first part, so far, and so far only, as they severally pertain to and are included within the boundaries of the Territory of Arizona or were to be exercised and enjoyed by said party of the first part within said Territory.

To have and to hold the same and each and every thereof, with the appurtenances, unto the said party of the third part, its successors and assigns, forever.

To the said party of the fourth part, its successors and assigns, all the right of way, right to borrow material, etc., grant of land for station purposes, etc., the land grant, and the right or franchise to construct and enjoy a railroad and telegraph line as aforesaid by sections 8, 9 and 1 of said act of Congress of March 3, 1871, granted to said party of the first part, so far, and so far only, as they severally pertain to and are included within the boundaries of the State of California or were to be exercised and enjoyed by said party of the first part within said State, and especially all rights and privileges which said party of the first part has acquired and now possesses in the vicinity of the city of San Diego, in the State of California.

To have and to hold the same and each and every thereof, with the appurtenances, unto the said party of the fourth part, its successors and assigns, forever.

94 The foregoing grants and each thereof are made pursuant to said agreement of November 26, 1881, which has been duly ratified and confirmed by each of the corporate parties hereto in their corporate capacity and upon the condition that any Congressional confirmation or ratification thereof shall contain a provision that they are acquired by said parties of the second, third, and fourth parts respectively, their successors and assigns, subject to the right of the said party of the first part and a reciprocal right on the part of the said parties of the second and third parts and the Southern Pacific Railroad Company of California to have the entire roads of each and all of said companies operated and used

for all purposes of travel and transportation, so far as the public and the Government are concerned, as one continuous line: Provided, however, this conveyance and the grants therein made shall not affect the rights, privileges, and easements secured by the grantor by the said agreement of November 26, 1881, and by the decrees in New Mexico and Arizona, to be entered in pursuance of article XIV of said agreement.

In testimony whereof and pursuant to an order of its board of directors, heretofore duly made and entered of record, said party of the first part has caused these presents to be signed by its president and countersigned by its secretary and its corporate seal to be hereunto affixed on the day and year first above written.

[Seal T. & P. R. R. Co.]

THE TEXAS AND PACIFIC RAILROAD CO.,
By JAY GOULD, *President.*

Sealed and delivered in the presence of—
GUY PHILLIPS.

Attest: C. E. LUTTERLEE, *Secretary.*

Which was all the evidence introduced or offered by either party on the trial of said cause.

95 The said plaintiff thereupon moved the court to instruct the jury that under the evidence they should find the defendant guilty; but the court refused said instructions, and to this decision and ruling of the court in refusing said instructions the said plaintiff then and there excepted.

Whereupon the said court, upon the motion of the said defendant, instructed the jury in words and figures as follows, to wit:

The court instructs the jury, under the facts stipulated and read in evidence in the case, the plaintiff has not made out such a case as entitles it to recover a verdict against the defendant. The jury will therefore find the defendant not guilty.

And the said plaintiff then and there objected to said instruction and excepted to the judgment and decision of the court in giving said instruction to the jury, which was all and the only instruction given to the jury on the trial of said cause.

Whereupon the jury, in pursuance of the said instructions so given as aforesaid, came into court and rendered a verdict as follows, to wit: "We, the jury in the above-entitled cause, do find the defendant not guilty."

And thereupon the said plaintiff moved the court to set aside said verdict, to arrest the judgment therein, and to grant a new trial; which said motions were overruled by the court, and the said plaintiff then and there excepted to the judgment and decision of said court in refusing to set aside said verdict, to arrest the judgment, and granted a new trial. Inasmuch, therefore, as the said evidence and instructions given to the jury on the trial of said cause and rulings of said court in refusing said instructions prayed for by said

plaintiff and in giving said instruction, which was given on the motion of said defendant, and the exceptions taken by said plaintiff to said decisions *and* not matters of record in said cause, the
96 said plaintiff here prays that this his bill of exceptions containing the same may be signed, sealed, and made a part of the record in said cause, which is done accordingly this 18th day of December, A. D. 1885.

W. F. HENDERSON,
Associate Justice, Judge Third District.

We hereby agree that the foregoing bill of exceptions is correct, and that the same be signed by the pages.

—— ——,
Attorneys for Defendant.

District Court, Doña Aña County, Special November Term, 1885.

THE SOUTHERN PACIFIC R. R. CO. OF NEW MEXICO
vs.
TEOFILO ESQUIBEL.

It is hereby agreed that the declaration, plea, and similiter filed in the above-entitled cause, the motion to the motion to set aside verdict and grant a new trial, the foregoing bills of exceptions, and the final judgment entered in said cause contain all the record in said cause that is necessary to enable the supreme court to review said cause.

This — day of December, A. D. 1885.

CATRON, THORNTON & CLANCY,
Attorneys for Plaintiff.
RYNERSON & WADE,
Attorneys for Defendant.

TERRITORY OF NEW MEXICO, *Third Judicial District Court,* } *ss:*

I, W. J. Joblin, clerk of said court, do hereby certify that the above and foregoing is a true and correct transcript of a proposed record in the case of the Southern Pacific Railroad Company *versus* Teofilo Esquibel, as of record and papers on file in my office.

[SEAL.] In witness whereof I have hereunto set my hand and seal of said court this 21st day of December, A. D. 1885.

W. J. JOBLIN, *Clerk.*

97 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government of said Territory, on the first Monday of January, in the year one thousand eight hundred and eighty-six, and on the second day of said term, the same being Tuesday, January 5th, 1886, the following, among other, proceedings were had, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, Appellant,
vs.
TEOFILO ESQUIBEL, Appellee.

259. Appeal from Third District, Doña Aña Co.

Now comes said defendant and appellee, by his attorney, E. C. Wade, Esq., and enters his appearance herein, and it is thereupon ordered by the court that this cause be, and the same hereby is, set down for argument at the incoming of court on the second Friday of the present term.

And afterwards, to wit., on the 23rd day of January, 1886, said parties filed in said clerk's office their stipulation, which is in the words and figures following, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, Appellant,
vs.
TEOFILO ESQUIBEL, Appellee.

In the Supreme Court. Appeal from Doña Aña County, January Term, 1886.

It is hereby stipulated and agreed by and *and* between the appellant and appellee in the above-entitled cause that the assignment of errors and joinder therein may be filed at the time of filing this stipulation, and that said cause be submitted to supreme court on the briefs of appellant and appellee and the reply of appellant to the brief of appellee.

Jan'y 19th, 1886.

T. B. CATRON,
Att'y for Appellant.
RYNERSON & WADE,
Att'y- for Appellee.

And afterwards, to wit, on said January 23rd, 1886, said appellant filed in said clerk's office its assignment of errors, which is in the words and figures following, to wit:

Supreme Court, January Term, 1886.

SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO
vs.
TEOFILO ESQUIBEL.

98 And the said appellant now comes and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in directing the jury to find the defendant not guilty.

2. The court erred in refusing to give the instruction prayed for by plaintiff to find the defendant guilty.

3. Said judgment was rendered in favor of defendant when it should have been rendered in favor of the plaintiff.

Wherefore the said appellant prays that the said judgment may be reversed, annulled, and held for naught, and that he may be restored to all things he has lost by reason thereof.

CATRON, THORNTON & CLANCY,
Att'ys for Pl'ff.

And now comes the appellee in the above cause and says there is no error in the said record, and he prays the said judgment be affirmed.

RYNERSON & WADE,
Att'ys for Def't.

And afterwards, to wit, on the eighteenth day of the said term, the same being Saturday, January 23rd, 1886, the following, among other, proceedings were had, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, Appellant,
vs.
TEOFILO ESQUIBEL, Appellee.
} 259. Ejectment. Appeal from Doña Aña County.

By agreement of said parties, by their respective attorneys, as by their stipulation filed herein, this cause is submitted to the court upon the record, assignment of errors, and joinder in error and briefs filed and to be filed herein.

And afterwards, to wit, on the eighth day of the regular January, 1889, term of said supreme court, the same being January 15th, 1889, the following, among other, proceedings were had, to wit:

THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, Appellant,
vs.
TEOFILO ESQUIBEL, Appellee.
} 259. Appeal from District Court, Doña Aña Co.

This cause having been heretofore submitted to the court on briefs and taken under advisement, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Reeves, affirming the judgment of the lower court for reasons stated in the opinion on file, Chief Justice Long and Associate Justice Brinker concurring. It is therefore considered and adjudged by the court that the judgment in this case of the district court of Doña Aña county be, and the same hereby is, affirmed, and that in accordance therewith said cause be, and the same hereby is, dismissed; that said defendant go hence without day, and that said plaintiff and appellant pay the costs of this suit, to be taxed, as well in the lower court as in this court, and that execution issue therefor.

99

And afterwards, to wit, on the 15th day of June, 1889, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a writ of error in the above-entitled cause, the original of which is hereto attached and is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of New Mexico, before you, between The Southern Pacific Railroad Company of New Mexico, appellant, and Teofilo Esquibel, appellee, a manifest error has happened, as it is said, to the great damage of the said appellant, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, 1889, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] S. BURKHART,
Clerk of the Supreme Court of the Territory of New Mexico.

And afterwards, to wit, on the 11th day of July, 1889, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereto attached and is in the words and figures as follows, to wit:

100 The President of the United States to Teofilo Esquibel, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein The Southern Pacific Railroad Company of New Mexico is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected

and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, this second day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

ELISHA V. LONG,
Chief Justice of the Supreme Court of the Territory of New Mexico.

Service of the within writ of citation acknowledged this 9th day of July, 1889.

RYNERSON & WADE,
Attorneys for the Within-Named Defendant in Error.

And afterwards, to wit, on the second day of July, 1889, there was filed by said plaintiff in error in said clerk's office a bond for costs, which is in the words and figures following, to wit:

Know all men by these presents that we, John H. Knaebel and Frank W. Clancy, of the county of Santa Fé and Territory of New Mexico, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of five hundred dollars, current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, in a suit depending in the supreme court of the Territory of New Mexico between The Southern Pacific Railroad Company of New Mexico, appellant, and Teofilo Esquibel, appellee, a judgment was rendered against the said appellant, and the said appellant having obtained a writ of error to remove the said cause to the Supreme Court of the United States and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

Now, the condition of the above obligation is such that if
101 the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said James H. McKenney, clerk as aforesaid, and charged to the said plaintiff in error in the prosecution of the said writ of error, then the above obligation to be void; otherwise to remain in full force and virtue.

JNO. H. KNAEBEL. [SEAL.]
FRANK W. CLANCY. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Before me, the undersigned, clerk of the supreme court of the Territory of New Mexico, personally appeared on this eighth day of June, 1889, John H. Knaebel and Frank W. Clancy, who, being duly sworn, each for himself says that he is worth the sum of five hundred dollars above his just debts and liabilities and the amount by law exempt from execution.

Witness my hand and the seal of said court this 8th day of June, 1889.

[SEAL.] S. BURKHART, *Clerk.*

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

ELISHA V. LONG,
Chief Justice Supreme Court of New Mexico.

UNITED STATES OF AMERICA, }
Territory of New Mexico, } *ss:*

I, Summers Burkhart, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, papers filed, and judgment given in the cause lately pending in said supreme court in which The Southern Pacific Railroad Company of New Mexico was appellant and Teofilo Esquibel was appellee as the same are of record and on file in my office.

Witness my hand and the seal of said supreme court this — day of July, 1889.

Seal First Judicial District Court, Territory of New Mexico.

SUMMERS BURKHART, *Clerk.*

102 In the Supreme Court of the Territory of New Mexico, January Term, 1889.

THE SOUTHERN PACIFIC RAILWAY COMPANY OF NEW MEXICO, Appellant,
vs.
TEOFILO ESQUIBEL, Appellee. } No. 259.

Upon the trial of the above-entitled cause it was stipulated by the parties that the facts relating thereto were as follows:

First. The Southern Pacific Railroad Company of New Mexico is a corporation organized under the laws of the Territory of New Mexico in the year of 1880.

Second. The Texas and Pacific Railroad Company is a corporation organized under an act of the Congress of the United States enti-

tled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3rd, 1871, and an act of said Congress entitled "An act supplementary to an act entitled An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes, approved March third, 1871," this last-mentioned act having been approved May 2, 1872, which said two acts are hereby made a part of the stipulation, copies thereof being attached hereto, marked exhibits.

Third. The Texas and Pacific Railroad Company accepted said charter of incorporation, and, within the time therein provided, was organized thereunder.

Fourth. Within two years after the passage of said act of March 3, 1871, and in accordance with said two acts, the said Texas and Pacific Railroad Company did designate the general route of its said road as near as might be, and did file a map of the same in the Department of the Interior, at Washington, which said general route so designated corresponded with the line of road constructed, as hereinafter stated, by the Southern Pacific Railroad Company of New Mexico.

Fifth. Immediately after the filing of said m-p the Secretary of the Interior caused the lands within forty miles on each side of said designated route within the Territories of New Mexico and Arizona and twenty miles within the State of California to be withdrawn from pre-emption, private entry, and sale.

Sixth. That thereafter the said Texas and Pacific Railroad Company did commence the construction of its said road at the eastern terminus thereof, at or near Marshall, in the State of Texas, as described in said act, and did prosecute the same and have the same completed at or near El Paso, designated as a point on said road by said act of Congress, on or before the second day of May, 1882.

Seventh. That the Southern Pacific Railroad Company of New Mexico, in the years 1880 and 1881, after its organization, constructed a railroad of the character, kind, and description required by said two acts of Congress from the western boundary line of the
103 Territory of New Mexico, through the Territory of New Mexico, on the said line of the general route of said Texas and Pacific Railroad Company, as designated in and by the said map filed in the Department of the Interior as aforesaid, to the State line of Texas, on the Rio Grande river, near El Paso, Texas, and connected the same with the said Texas and Pacific railroad constructed as aforesaid at or near El Paso aforesaid.

Eighth. After the completion of the Southern Pacific railroad to El Paso the Texas and Pacific Railroad Company claimed and insisted the same was built upon its right of way under said acts of incorporation, and that the said road thereby became the property of said Texas and Pacific Railroad Company, and thereupon, in May, 1881, commenced a suit in the third judicial district court of the Territory of New Mexico against the Southern Pacific Railroad Company of New Mexico to have said road so constructed by the

Southern Pacific Railroad Company of New Mexico decreed to be the property of said Texas and Pacific Railroad Company, a copy of the bill of complaint in said cause being hereto attached and made a part of this agreement, as also is a copy of the order made by Hon. Warren Bristol, as judge of said district court, on the filing of said bill of complaint.

Ninth. That during the pendency of said suit the said Texas and Pacific Railroad Company definitely fixed the line of its proposed road under said acts of Congress across the Territory of New Mexico at the centre of the road-bed of the said road constructed as aforesaid by the Southern Pacific Railroad Company of New Mexico in the manner as required by law.

Tenth. Owing to doubts and uncertainties as to the result of said litigation and for reasons therein stated an agreement to compromise the same was entered into by and between the said Texas and Pacific Railroad Company and the Southern Pacific Railroad Company of New Mexico, a copy of which said agreement is filed herewith and made a part of this stipulation as evidence in this case, and that in accordance with said agreement a decree was entered in said cause, a copy of which is filed herewith and made a part of this stipulation as evidence in this cause, and also two deeds of conveyance were made and executed by the said Texas and Pacific Railroad Company to the said Southern Pacific Railroad Company of New Mexico, by one of which was conveyed all the right, title, interest, claims, and demands of said Texas Pacific Railroad Company in and to the right of way two hundred feet wide from the Arizona line across New Mexico at or near El Paso on the line of the road of the Southern Pacific Railroad Company of New Mexico, a copy of which said deed is hereto attached and made a part of the stipulation as evidence in said cause, the other deed of conveyance being an assignment and conveyance to the Southern Pacific Railroad Company of New Mexico by the Texas and Pacific Railroad Company of the right of way, the right to take material from the public lands; also grounds for station buildings,
workshops, wharves, switches, side tracks, &c., depot grounds;
104 also the right of franchise of the Texas and Pacific Railroad
Company to lay out, locate, construct, finish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, from a point on the Rio Grande near El Paso westward on the most direct and eligible route near the 32 parallel of north latitude, granted to said Texas and Pacific Railroad Company by said acts of Congress, and also all the lands granted to said Texas and Pacific Railroad Company by the ninth section of said act of Congress approved March 3, 1871, to aid in the construction of the railroad and telegraph line described in the first section of said act, a copy of which said conveyance is attached hereto and made a part of this stipulation as evidence in this cause.

Eleventh. That the said railroad to be constructed under and in accordance with the said two acts of March 3, 1871, and May 2, 1872, has not been completed in that portion of the State of California between the Colorado river and San Diego.

Twelfth. That the said defendant, since the said Texas and Pacific Railroad Company designated its general route and filed a map thereof as aforesaid, and after it had definitely fixed the line of said road across the Territory of New Mexico, and after the making of said agreement with — Southern Pacific Railroad Company of New Mexico and entering the said decree and making, executing, and delivering the said two deeds of conveyance, the said defendant entered upon the land in question, which is a *a* part of one of the odd sections within forty miles of the line of said road as fixed and designated by the Texas and Pacific Railroad Company as aforesaid, said land in question being situated in the county of Doña Aña, and said defendant occupied and held possession of same at the time of the commencement of this suit adverse to plaintiff.

Thirteenth. That on February 28, 1885, an act of Congress in the following words was passed and approved: "That all lands granted to the Texas Pacific Railroad Company under the act of Congress entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes' approved March 3, 1871, and acts amendatory thereof or supplemental thereto be and they are hereby declared forfeited and the whole of said lands restored to the public domain and made subject to the disposal under the general laws of the United States as though said grant had never been made: Provided, that the price of the land so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant." "Section 2. That the act of March 3rd, 1875, entitled "An act for the relief of settlers within railroad limits" is hereby repealed. Approved February 28th, 1885."

Fourteenth. That the said defendant, on the twenty-seventh day of March, A. D. 1885, filed his homestead entry on the land in question with the register of the United States land office at Las Cruces, New Mexico, paid the lawful fees for the same, and received the usual certificate therefor.

After the evidence was closed the plaintiff moved the court
105 to instruct the jury that under the evidence they should find the defendant guilty, but the court refused the instruction, and to this decision and ruling of the court the plaintiff excepted.

Whereupon the court, upon the motion of the defendant, instructed the jury as follows, to wit:

"The court instructs the jury under the facts stipulated and read in evidence in the case the plaintiff has not made out such a case as entitles it to recover a verdict against the defendant; the jury will, therefore, find the defendant not guilty."

To which the plaintiff excepted; whereupon the jury returned a verdict as follows, to wit:

"We, the jury in the above-entitled cause, do find the defendant not guilty."

And thereupon the plaintiff, by its counsel, moved the court for a new trial for the reason that the verdict was against the law and the evidence in the cause, which the court overruled, and dismissed the suit at the plaintiff's costs, and thereupon the plaintiff excepted and

moved the court to grant it an appeal from the judgment to the supreme court of the Territory, which motion was granted, and the plaintiff brings the case into the supreme court by appeal, and assigns for error:

1. The court erred in directing the jury to find the defendant not guilty.

2. The court erred in refusing to give the instruction prayed for by plaintiff to find the defendant guilty.

3. Said judgment was rendered in favor of defendant when it should have been rendered in favor of the plaintiff.

It is contended for the appellant that the grant of the land in question to the Texas and Pacific Railroad Company was a grant *in presenti* and had the effect to convey the land to said railway company, referring to the ninth section of the act of March 3, 1871. This section provided: "That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, as such line may be adopted by said company through the territories of the United States and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

The sections designated as granted were incapable of identification until the line of the road should be "definitely fixed." "When the route is established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense the grant is one *in presenti*." * * *

106 Van Wick *vs.* Knevals, 106 U. S., 365, 366.

The act intended that the location of the road should be followed by its construction.

Missouri, Kansas and Texas Railroad Company *vs.* Kansas Pacific Railroad Company, 97 U. S. R., 498, and sec. 13 of the act of Congress.

This section provided that the president of the company should annually make a report and file it with the Secretary of the Interior, which report should be under oath, exhibiting, among other things, the number of miles of road constructed each year and a description of the lines of road surveyed and fixed upon for construction. Section 12 provided that whenever the company should complete the first and each succeeding section of twenty consecutive miles of railroad and put it in running order as a first-class road in all its appointments it should be the duty of the Secretary of the Interior to cause patents to be issued conveying to the company the number of sections of land opposite to and coterminous with the completed road to which the company should be entitled for each

section so completed. * * * Section 18. That the President of the United States, upon the completion of the first section of twenty miles, should appoint one commissioner, whose duty it should be to examine the various sections of twenty miles as they should be completed and report thereon to him in writing, and if from said report he was satisfied that said company had fully completed each section of its road as in the act provided he should direct the Secretary of the Interior to issue patents to said company for the lands it was entitled to under the act as fast as each section of the road was completed.

The company, within two years after the passage of the act of March 3, 1871, designated the general route of its road and filed a map of the route in the Department of the Interior. The Secretary of the Interior then caused the land within forty miles on each side of the designated route within the Territories of New Mexico and Arizona and twenty miles within the State of California to be withdrawn from pre-emption, private entry, and sale. The map did not show the definite and fixed location of the road, but it was a map showing only the general route of the road.

See bill of complaint of the Texas and Pacific Railroad Company *vs.* The Southern Pacific Railroad Company of New Mexico and others, Tr., pages 40, 59, and arts. 4, 5, & 8; agreed statement of facts, Tr., pages 10 and 11.

At this point a statement of the case will be necessary to an understanding of the questions in controversy.

The Southern Pacific Railroad Company of the Territory of New Mexico was organized under the laws of the Territory in 1880. In the years of 1880 and 1881 this company constructed a railroad across the Territory of New Mexico on the line of road claimed by the Texas and Pacific Railway Company as its right of way. In
107 its suit brought in 1881 the Texas and Pacific Railway Company sought a decree divesting all the title which the Southern Pacific Railroad Company of New Mexico might have or claim in said road, with its fixtures, &c., and vesting in the Texas and Pacific Railway Company upon such terms as the court might deem right. During the pendency of the suit the Texas and Pacific Railway Company definitely fixed the line of its proposed road across the Territory of New Mexico at the centre of the road-bed of the road constructed by the Southern Pacific Railroad Company of New Mexico. It is not claimed by the Texas and Pacific Railway Company that the line of its road in the Territory of New Mexico was definitely fixed before the Southern Pacific Railroad Company of New Mexico had constructed its road across the Territory. The suit was originally between the Texas and Pacific Railway Company and the Southern Pacific Railroad Company of New Mexico. Other companies were made parties in the decree of the court, namely, the Southern Pacific Railroad Company of Arizona, the Southern Pacific Railroad Company of California, the Los Angeles and San Diego Railroad Company, and the Central Pacific Railroad Company.

Still other companies that owned or controlled connecting lines

of roads were also parties in the agreement and compromise, viz: The Missouri Pacific Railroad Company, the Missouri, Kansas and Texas Railroad Company, and the St. Louis, Iron Mountain and Southern Railway Company. The suit was compromised on the terms set out in the agreement of the parties and the decree of the court. By the terms of the agreement the Texas and Pacific Railway Company transferred to the Southern Pacific Railroad Company of New Mexico its land grant and franchises to construct a railroad and telegraph line and other rights within the boundaries of the Territory of New Mexico; a like transfer to the Southern Pacific Railroad Company of the Territory of Arizona of the land grant and franchises included within the boundaries of Arizona; a like transfer to the Los Angeles and San Diego Railroad Company of the land grant, franchises, &c., included within the boundaries of the State of California.

The consideration to the Texas and Pacific Railway Company for the transfer was the agreement of the Southern Pacific Railway Companies that the road of the Texas and Pacific Railway Company and the roads of the three Southern Pacific Railroad Companies and their connections should be operated and used for all purposes of communication, travel, and transportation so far as the public and Government were concerned as one continuous through line, the gross earnings to be divided between them in the proportion agreed upon.

The decree of the court contains, among other provisions, the following, viz: * * * "It is expressly considered, ordered, and adjudged that, except as to the rights, privileges, and easements aforesaid, the said Texas and Pacific Railway Company has no right, title, estate, claim, or demand at law or in equity in or to the way, right of way, and railroad, with its appurtenances, constructed by the Southern Pacific Railroad Company of New Mexico in the Territory of New Mexico or in or to the way, right of way, and
108 railroad, with its appurtenances, constructed by the Southern Pacific Railroad Company of Arizona in the Territory of Arizona."

The Texas and Pacific Railway Company had no right to entangle its affairs in these unauthorized transactions upon any assumption that they would be ratified by Congress.

Commoner *vs.* Smith, 10 Allen, 455.
Mathews *vs.* Skenker, 62 Mo., 329.
Boone's Law of Corporations, sec. 243.

The act of Congress contemplated a road for postal, military, and other governmental services, to be under one management and control, and not an easement and dependency in a system of railways owned and controlled by other and different corporations, as provided by the terms of the agreement and the decree of the court.

The Government was not bound by these proceedings in which it was not a party, and although it was stipulated by the parties that the road constructed by the Southern Pacific Railroad Company of New Mexico was a road of the character, kind, and descrip-

tion required by the two acts of Congress, it did not appear that the President of the United States or the Secretary of the Interior approved it as being completed in accordance with the requirements of these acts.

The Texas and Pacific Railway Company had no right to make the transfer by virtue of the power conferred on the company by the 5th section of the act to make running arrangements with other railroad companies, nor power to transfer its own land grant, road, and franchises by authority of the 4th section of the act empowering the company to purchase the land grant and franchises of and to consolidate with any railroad company chartered on the route of the Texas and Pacific Railway Company; that such transfer was contrary to the 6th section of the act, to the effect that the rights, franchises, and property of every description belonged to each of the consolidated or purchased companies should vest in and become absolutely the property of the Texas and Pacific Railroad Company.

It was argued for the appellant that if the land could be mortgaged for the means to construct, equip, and operate the road, it could be assigned in the first place for the same object. It has been held that a power to purchase includes a power to take a mortgage. The proposition that a power to mortgage includes a power to sell is not supported by authority of law. A corporation must exercise its powers in the mode prescribed by its charter. The power to procure means to construct the road in question was not a general power; it was a particular power to be exercised for a specific object. The Texas and Pacific Railway Company was authorized to issue construction and land bonds and to execute mortgages to secure the bonds on its land grant and other lands the company might acquire; the proceeds of the sales of the bonds to be applied to the construction, operation, and equipment of the road and for the purchase, construction, completion, equipment, and operating of other roads as contemplated and specified in the acts of Congress.

109 The act required that the bonds and mortgages should contain an extract from the law authorizing them to be issued, and that the mortgages should be filed and recorded in the Department of the Interior. The appellant was not a mortgagee nor a purchaser under a mortgage. No mortgage or bond was given in aid of the construction of the road. Sections 11 and 14, act March 3, 1871, and sections 2 and 3, supplementary act of May 2, 1872.

It is further contended for the appellant that the proviso in the 9th section of the act implied the right to sell or otherwise dispose of the land. The proviso is to the effect that the lands granted to the company by the 9th section of the act, which should not be sold or otherwise disposed of within three years after the completion of the road, should be subject to settlement and pre-emption like other lands. The proviso was a limitation on the power of the company to hold the lands beyond the period of three years after the completion of the road.

How the lands were to be acquired and to be sold or otherwise disposed of must be determined from the provisions of the act viewed as a whole.

The Texas Pacific Railroad Company was required by the act of Congress to commence the construction of its road at a point at or near Marshall, in the State of Texas, and at San Diego, in the State of California, and to complete specified portions of the road in stated times, and to complete the whole line from the point at or near Marshall to the Bay of San Diego within ten years after the passage of the act of March 3, 1871, extended to ten years after the passage of the supplementary act of May 2, 1872. Upon compliance with the terms of the act in relation to the times fixed for the completion of the road, it was provided that the land grant should "duly inure" to the company. Section 17 of the act of March 3, 1871, and section 5 of the supplementary act of May 2, 1872; *id.*, sec. 2.

It was admitted in evidence on the trial that the Texas and Pacific Railway Company commenced the construction of its road at the eastern terminus, near Marshall, and had it completed to El Paso on or before the 2nd day of May, 1882. This portion of the road was not in controversy in the suit.

It was further admitted that the road had not been completed in that portion of the State of California between the Colorado river and San Diego.

It is further contended for the appellant that there can be no forfeiture of the lands granted to the Texas Pacific Railroad Company, because Congress had reserved the right not to forfeit, but to adopt such measures as it might deem necessary and proper to secure the speedy completion of the road upon failure of the company to complete it. The appellant claiming under the defaulting railroad company will not be heard to complain that the forfeiture of the land grant, thereby subjecting the land to the control of Congress, was not a proper measure to secure the completion of the road.

The provision was intended for the protection of the Government and not for the benefit of the railroad company. Time was of the essence of the contract. The Texas and Pacific Railroad Company had incurred the forfeiture of its land grant by its failure to complete the road as required by the acts of Congress. The forfeiture may be asserted by the United States through the action of Congress or by judicial proceedings.

Schulenberg *vs.* Harriman, 21 Wall., 44.
Railroad Land Company *vs.* Cartright, 21 Wall., 311.
Van Wyck *vs.* Knevals, 106 U. S., 368, 369.

The appellant had no standing in court. The judgment is affirmed.

R. A. REEVES,
Associate Justice.

We concur.
ELISHA V. LONG,
Chief Justice.
WM. H. BRINKER,
Associate Justice.

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, —— ——, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing eight pages and fourteen lines contain a true and correct copy of the opinion of the court in the cause lately pending therein, in which The Southern Pacific Railroad Company of New Mexico was appellant and Teofilo Esquibel was defendant, as the same is on file in my office.

Witness my hand and the seal of said court this — day of July, 1889.

[Seal Supreme Court, Territory of New Mexico.]

SUMMERS BURKHART, *Clerk.*

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of New Mexico, before you, between The Southern Pacific Railroad Company of New Mexico, appellant, and Teofilo Esquibel, appellee, a manifest error has happened, as it is said, to the great damage of the said appellant, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1889, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal Supreme Court, Territory of New Mexico.]

S. BURKHART,
Clerk of the Supreme Court of the Territory of New Mexico.

[Endorsed:] Filed in my office this 15th day of June, 1889. S. Burkhart, clerk sup. c't New Mexico.

112 The President of the United States to Teofilo Esquibel, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to a

writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein The Southern Pacific Railroad Company of New Mexico is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, this second day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

ELISHA V. LONG,
Chief Justice of the Supreme Court of the Territory of New Mexico.

Service of the within writ of citation acknowledged this 9th day of July, 1889.

RYNERSON & WADE,
Attorneys for the Within-Named Defendant in Error.

[Endorsed:] Original. Filed in my office this 11th day of July, 1889. S. Burkhart, clerk.

113 Know all men by these presents that we, John H. Knaebel and Frank W. Clancy, of the county of Santa Fé and Territory of New Mexico, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of five hundred dollars, current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 8th day of June, in the year of our Lord eighteen hundred and eighty-nine.

Whereas lately, in a suit depending in the supreme court of the Territory of New Mexico between The Southern Pacific Railroad Company of New Mexico, appellant, and Teofilo Esquibel, appellee, a judgment was rendered against the said appellant, and the said appellant having obtained a writ of error to remove the said cause to the Supreme Court of the United States and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said James H. McKenney, clerk as aforesaid, and charged to the said plaintiff in error in the prosecution of the said writ of error, then the above obligation to be void; otherwise to remain in full force and virtue.

JNO. H. KNAEBEL. [SEAL.]
FRANK W. CLANCY. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Before me, the undersigned, clerk of the supreme court of the Territory of New Mexico, personally appeared on this 8th day of June, 1889, John H. Knaebel and Frank W. Clancy, who, being duly sworn, each for himself says that he is worth the sum of five hundred dollars over and above his just debts and liabilities and the amount by law exempt from execution.

Witness my hand and the seal of said court this 8th day of June, 1889.

[Seal Supreme Court, Territory of New Mexico.]

S. BURKHART, *Clerk.*

114 TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

I, Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

ELISHA V. LONG,
Chief Justice, Supreme Court of New Mexico.

Filed in my office this 2nd day of July, 1889.

S. BURKHART, *Clerk.*

Endorsed on cover: Case No. 13,663. New Mexico Terr'y supreme court. No. 109. The Southern Pacific Railroad Company of New Mexico, plaintiff in error, *vs.* Teofilo Esquibel. Filed September 28, 1889.

996 163 US 704

Office Supreme Court U. S.
FILED
MAY 4 1896
JAMES H. McKENNEY,
CLERK

163-704

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

WALTER S. CHEESMAN AND GEORGE W. CLAYTON,
Petitioners,

vs.

JAMES A. SHREVE, J. A. PERKINS, BENJAMIN T. WELLS, J. T. HART, O. H. AIKINE, AS ADMINISTRATOR OF THE ESTATE OF CHARLES HUGHES, DECEASED, CHARLES HUXLEY, DAVID MILLS AND H. G. BURLEIGH,
Respondents.

Petition for Writ of Certiorari

TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES J. HUGHES, JR.,
TYSON S. DINES,
Attorneys for Petitioners.

CLARK & REID, PRINTERS, 1335 LAWRENCE ST., DENVER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

WALTER S. CHEESMAN AND GEORGE W. CLAYTON,
Petitioners,

vs.

JAMES A. SHREVE, J. A. PERKINS, BENJAMIN T. WELLS, J. T. HART, O. H. AIKINE, AS ADMINISTRATOR OF THE ESTATE OF CHARLES HUGHES, DECEASED, CHARLES HUXLEY, DAVID MILLS AND H. G. BURLEIGH,
Respondents.

Petition for Writ of Certiorari

TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Supreme Court of the United States:

I.

Come now Walter S. Cheesman and George W. Clayton, your petitioners—citizens and residents of the State of Colorado—and respectfully show:

First—That on January 21, 1889, petitioners, as plaintiffs, filed their complaint in the Circuit Court of

the United States for the District of Colorado against respondents, as defendants, for the recovery of certain mines and mining claims, together with damages for ores taken by respondents therefrom.

Second—On the 12th day of December, 1889, the cause was tried before the Court and a jury, and a verdict was returned and judgment entered in favor of respondents, defendants in the Circuit Court.

At that time the Civil Code of Colorado, as a part of the remedy in actions of this character, contained the following provision:

"SECTION 272. Whenever judgment shall be rendered against *either party* under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and, upon application of the party against whom the same was rendered, his heirs or assigns, the Court shall vacate such judgment and grant a new trial in such case, but neither party shall have but one new trial in any case, as of right, without showing cause."

Third—Petitioners (plaintiffs below) paid all costs as provided by such section, and on October 27, 1890, at their request, such judgment was set aside and vacated, and a new trial granted, as of right, under and by virtue of such section.

Fourth—The second trial was had, before Court and jury, in December, 1891, but the jury disagreed, and were discharged December 12, 1891. The costs of this mistrial, duly taxed, were $3,452.47.

Fifth—On June 27, 1893, the third trial was had, resulting in a verdict and judgment in favor of petitioners

(plaintiffs in the Circuit Court) for the property and $28,797.15 damages. Thereupon the costs, both of the mistrial and the last trial, were taxed against respondents, and final judgment was entered accordingly on the 27th day of June, 1893.

Sixth—On July 29, 1893, respondents (defendants below (filed their motion for new trial, for cause shown, which was argued and overruled.

Seventh—On November 2, 1893, respondents filed their motion for new trial, as of right, under the above statute, but, without making any motion to retax costs, declined to pay the costs of the mistrial which had been taxed against them, and paid only the costs of the last trial.

The Circuit Court thereupon denied such new trial claimed, as of right, in the following language: "For the reason that defendant has failed to pay the costs as required by law, and for no other reason."

Eighth—On or about July 1, 1894, and within one year from the entry of final judgment as aforesaid, respondents, defendants in the Circuit Court, sued out a writ of error upon the Supreme Court of the United States, and, on the 21st day of July, 1894, filed in this Court their transcript of the record and assignment of errors, whereby they attacked and sought to reverse, set aside and vacate the judgment of the Circuit Court as having been rendered without jurisdiction in the premises. This cause is numbered 760 of the October term, 1894, and is still pending herein, and undetermined.

Ninth—On the 2d day of November, 1894, long after the issuance of the writ of error from the Supreme Court of the United States and while the said cause was pend-

ing in said Supreme Court, on error as aforesaid, respondents sued out a writ of error from the Circuit Court of Appeals of the Eighth Circuit, assigning as error the ruling of the Circuit Court in not setting aside said final judgment as a matter of right.

The cause was, at the time of suing out such last writ of error, pending in this Court, and entitled:

> "James A. Shreve, J. A. Perkins, Benjamin F. Wells, J. T. Hart, O. H. Aikine, as administrator of the estate of Charles Hughes, deceased, Charles Huxley, Daniel Mills, and H. G. Burleigh,
>
> "*Plaintiffs in Error,*
>
> vs.
>
> "Walter S. Cheesman and George W. Clayton,
>
> "*Defendants in Error,*"

being No. 760 of the docket of the October term, 1894, where it is still pending and undetermined.

Tenth—Upon the issuance of the writ of error from the Circuit Court of Appeals, said cause was docketed in said Circuit Court of Appeals, entitled exactly the same as herein, and numbered 560 of the May term, 1895.

Eleventh—Your petitioners, defendants in error as above, duly filed in the said Circuit Court of Appeals of the Eighth Circuit, their motion to dismiss the writ of error in said Court, in words and figures as follows, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

NO. 560.

JAMES A. SHREVE *et al.*,
Plaintiffs in Error,
vs.
WALTER S. CHEESMAN *et al.*,
Defendants in Error.

Motion to Dismiss.

Now on this day come the defendants in error, appearing for the purpose of this motion only, and move this honorable Court to dismiss the writ of error prosecuted therein by the plaintiffs in error, and, for grounds of said motion, respectfully show unto this honorable Court.

That heretofore and on, to wit, the —— day of July, A. D. 1894, the said plaintiffs in error sued out a writ of error from the Supreme Court of the United States, which said writ of error is now pending and undisposed of in the Supreme Court of the United States, being No. 760 on the docket of said Court for the October term, A. D. 1894, the record thereof having been duly filed on the 21st day of July, A. D. 1894, upon the ground, and alleging that the Circuit Court of the District of Colorado, which tried this cause, was wholly without jurisdiction

to do so, and are now asserting and maintaining, in support of said writ of error so brought for that purpose, that the judgment rendered in behalf of the defendants in error by the Circuit Court of the United States for the District of Colorado, and being the same judgment which the said plaintiffs in error are seeking by the writ of error in this Court to have reversed and vacated, should be vacated and set aside for the reason that said Circuit Court of the United States for the District of Colorado was wholly without jurisdiction to hear or determine the same, and that this writ of error was sued out and prosecuted after the writ of error was sued out in the Supreme Court.

Wherefore, these defendants in error say that the said plaintiffs in error having elected to prosecute in the Supreme Court their writ of error upon the ground of lack of jurisdiction in the Circuit Court for the District of Colorado, to entertain or try said cause, cannot now, or after making such election or while prosecuting said writ of error in the Supreme Court of the United States, insist upon or prosecute their said writ of error in this Court.

For these reasons, as herein moved, the defendants in error ask this honorable Court to dismiss the writ of error of the plaintiffs in error herein.

CHARLES J. HUGHES, JR.,
TYSON S. DINES,
Attorneys for Defendants in Error.

Which said motion was duly argued and overruled.

Eleventh—That, thereafter, said Circuit Court of Appeals considered said cause upon its merits, and Judges Caldwell and Sanborn delivered the opinion hereinafter set forth as the opinion of said Court, while Judge Thayer dissented, as hereinafter more fully appears.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

NO 560—MAY TERM, A. D. 1895.

JAMES A. SHREVE, J. A. PERKINS, BENJAMIN T. WELLS, J. T. HART, O. H. AIKINE AS ADMINISTRATOR OF THE ESTATE OF CHARLES HUGHES, DECEASED, CHARLES HUXLEY, DAVID MILLS AND H. G. BURLEIGH, *Plaintiffs in Error,* vs. WALTER S. CHEESMAN AND GEORGE W. CLAYTON, *Defendants in Error.*	*In Error to the Circuit Court of the United States for the District of Colorado.*

MR. THOMAS M. PATTERSON and MR. CHARLES C. PARSONS for Plaintiffs in Error.

MR. TYSON S. DINES (MR. CHARLES J. HUGHES, JR., was with him on the brief) for Defendants in Error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

SANBORN, J., delivered the opinion of the Court.

Does Section 272, Chapter 23, of the Colorado Code of Civil Procedure of 1887, require the defeated party in an action to recover the possession of real property to

pay the costs of a prior mistrial of the action in which the jury has disagreed to entitle him to a new trial as of right under that section? If so, do the facts that the Circuit Court, in which the action was pending had, several years prior to his application, decided that this section did not require such payment, and that the defeated party complied with the provisions of that section as it had been construed by that Court, relieve him from the consequences of his failure to comply with the terms of the section as properly construed? These are the principal questions presented by this record.

The defendants in error, Walter S. Cheesman and George W. Clayton, brought an action in the Court below against the plaintiffs in error, James A. Shreve, J. A. Perkins and others, for the possession of certain real property and for damages for the removal of minerals therefrom. Issues were joined, the action was tried, and the jury disagreed. At the May term of the Circuit Court in 1893 the action was tried again, a verdict was returned, and on June 27, 1893, a judgment was rendered in favor of the defendants in error. Section 272 of the Code of Civil Procedure of Colorado provides:

"Whenever judgment shall be rendered against either party, under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time, before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the Court shall vacate such judgment and grant a new trial in such case."

On November 3, 1890, in Parkhurst vs. Price, the resident District Judge and acting Circuit Judge of the District of Colorado, delivered an opinion in which he

held that a party who was finally defeated in an action for the recovery of possession of real property was not required to pay the costs of a prior mistrial of the action in which the jury had disagreed, in order to entitle him to a new trial under this section. In accordance with this ruling, the plaintiffs in error paid all the costs in this action, except the costs of the mistrial, and on November 2, 1893, before the term next succeeding the entry of the judgment, applied for a new trial under this section. It so happened that the District Judge of another district was then temporarily holding the Circuit Court in the District of Colorado. He heard this application, took it under advisement, and on May 26, 1894, denied it on the ground that the defendants in error had failed to pay the costs as required by law. On November 23, 1894, the plaintiffs in error sued out the writ of error in this case to reverse this order denying the new trial.

A motion was made by the defendants in error to dismiss this writ because the plaintiffs in error had, on June 26, 1894, sued out of the Supreme Court of the United States a writ of error to reverse the judgment in this action, on the ground that the Court below had no jurisdiction of the case. The order denying the new trial, which the statute granted as a right, is a final decision that is reviewable in this Court under the Act which established it. 26 Stats., Chapter 517, Section 6; Sup. Rev. Stats., page 903, Section 6; Standley vs. Roberts, 8 C. C. A., 305, 308, 59 Fed. Rep., 836; Iron Silver Mining Co. vs. Mike and Starr Gold and Silver Mining Co., 6 C. C. A., 180, 56 Fed. Rep., 956; Iron Silver Mining Co. vs. Campbell, 10 C. C. A., 172, 61 Fed. Rep., 932. The fact that the plaintiffs in error are exercising a right given to them by the same Act of Congress to the decision of the Supreme Court upon another question in

this case is no reason for us to deprive them of their right to a hearing and determination of the question committed to our decision by that Act. The fact that our writ of error was not issued until after the Supreme Court had issued its writ is not material. The question before the Supreme Court arises upon proceedings anterior to the judgment, and the question before this Court upon proceedings subsequent to the judgment, so that the requisite records, as well as the questions before the two Courts, are different, separate and distinct.

The fact that the bill of exceptions was certified after the writ of the Supreme Court issued is not a fatal objection to the bill. It was made and certified during the term at which the order denying the new trial was made. It contains a record of the facts disclosed at the hearing which resulted in that order. The fact that a writ of error had been issued to review the judgment certainly did not deprive the Court below of its jurisdiction or relieve it of its duty to make a true record of the proceedings in that Court after the judgment. This bill of exceptions is that record. It was rightfully made and is properly in this case for our consideration. Hunnicutt vs. Peyton, 102 U. S., 333, 353, 354.

The motion to dismiss is denied.

Section 272 of the Colorado Code, *supra*, gives to the party against whom a judgment for the recovery of real property is rendered a right "to pay all costs recovered thereby," and then to have a new trial of the action. The statutes of Colorado provide:

"If any person shall sue in any Court in this State in any action, real, personal or mixed, or upon any statute for any offense or wrong immediately personal to the plaintiff, and shall recover any debt or damages in such action, then the plaintiff or demandant shall have judg-

ment to recover against the defendant his costs to be taxed; and the same shall be recovered, together with the debt or damages, by execution, except in the cases hereinafter mentioned. 1 Mills' Ann. Stats. of Colorado, 1891, Section 677.

In the case at bar the defendants in error recovered a judgment for the possession of certain real property, for $28,957.15 damages, "and their costs to be taxed." Their costs at the mistrial were taxed at the amount of $1,814.81, and the costs of the last trial were taxed at $128 97. The plaintiffs in error paid the latter, but did not pay the former amount. It goes without saying at this late day that under Section 721, Revised Statutes, the defendants in error were entitled to recover such costs as were allowed by the statutes of Colorado in the absence of any Act of Congress prescribing a different rule. Hathaway vs. Roach, 2 Woodb. & M., 63 Fed. Cases, No. 6213; Ethridge vs. Jackson, 2 Sawyer, 598, Fed. Cases, No. 4541.

An exhaustive and interesting argument drawn from the history of the allowance of costs to the prevailing party has been made by counsel for plaintiff in error to show that the words "costs to be taxed" in Section 677, *supra*, of the Colorado Statutes, mean his costs at the last trial to be taxed. This argument is, in substance, that at common law no costs were recovered, that costs were first allowed in A. D. 1279 by the statute of Gloucester (6 Edward I., c. 1), that in 1800 in Bird vs. Appleton, 1 East, 111, the Court of King's Bench held that under that and numerous ancillary statutes the costs of a mistrial could not be recovered by the party who finally prevailed, that this construction was adopted by the Court of Common Pleas in 1816 in the Worcestershire Canal Company vs. The Trent Navigation Com-

pany, 2 Marshall, 475, that the State of Colorado has provided that in that State the common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British Parliament made in aid of or to supply the defects of the common law, prior to the fourth year of James the First, which are of a general nature, and not local to that kingdom, shall be the rule of decision and shall be considered as of full force until repealed by legislative authority, with certain exceptions not material here (Mills' Ann. Stats. of Colorado, 1891, Section 4184), that it is a settled rule that whenever a statute of a foreign state is adopted, the construction placed upon it by the judicial tribunals of that State before its adoption is adopted with it, and that, consequently, the rule declared in Bird vs. Appleton and the Worcestershire Canal Co. vs. The Trent Navigation Co., that a prevailing party cannot recover his costs of a mistrial, has become the law of the State of Colorado. The argument is logical and persuasive. It would be entitled to serious consideration if the statute of Gloucester and the Acts of Parliament that enlarged its scope were actually in force in the State of Colorado. They are not. The statute of that State, which we have quoted, and that alone measures the rights of parties to costs in this action, and that statute bears about the same relation to the statute of Gloucester that one of Fulton's steamboats does to the modern ocean liner. The statute of Gloucester provided that the demandant might recover against the tenant the costs of his writ purchased, together with his damage, and that the Act should hold place in all cases where a man recovered his damage. The statute of Colorado provides that the prevailing party shall recover his costs to be taxed. It is plain that the construction placed upon the

former statute could be of very little value as a guide to the proper interpretation of the latter. Moreover, the statute of Colorado needs no interpretation. Its language is simple and plain. "His costs to be taxed" cannot mean less than all his costs in the action to be taxed. The moment an attempt is made to limit these words to a part of his costs, we are met by the unanswerable question, What part? That which was before clear and certain becomes a matter of doubt and conjuncture.

When the meaning of a statute is plain, arguments drawn from the history of the legislation it embodies and the construction given to ambiguous statutes on the same or similar subjects serve only to create doubt where none should exist, and to confuse the judgment when it would otherwise be sound and clear. There is no better canon of interpretation than that, when a statute is plain and unambiguous, the Legislature must be presumed to have intended what it has expressed, and no room is left for construction. Knox County vs. Morton, 68 Fed. Rep., 787; United States vs. Fischer, 2 Cranch, 358, 399; St. Paul, etc., Railway Co. vs. Phelps, 137 U. S., 528, 536. It was as imperatively necessary for the plaintiffs in error to procure the attendance of their witnesses and to incur the costs of the mistrial as it was for them to incur the costs of serving the summons or procuring the attendance of witnesses at the last trial. If they had incurred no costs at the mistrial, they would in all probability have been defeated then. The statute does not except these costs from its general provision, and it would be judicial legislation for the Court to create exceptions to the general provisions of this law when the Legislature has made none. Where the Legislature has made no exception to the positive terms of a general statute, the conclusive presumption is that it intended

to make none, and it is not the province of the Courts to do so. Madden vs. Lancaster County, 12 C. C. A., 564, 573, 64 Fed. Rep., 660; Morgan vs. City of Des Moines, 8 C. C. A., 569, 60 Fed. Rep., 208; McIver vs. Ragan, 2 Wheat., 25, 29; Bank vs. Dalton, 9 Howard, 522, 528; Vance vs. Vance, 108 U. S., 514, 521.

Our conclusion is that:

The provisions of Section 677, Mills' Annotated Statutes of Colorado, 1891, that the prevailing party shall recover his costs to be taxed authorizes him to recover all his costs in the action, including those of a prior mistrial, as well as those of the final trial, and a defeated party who would obtain a new trial under Section 272 of the Code of Civil Procedure of Colorado, 1887, must first pay the costs of the prevailing party at a mistrial as well as all other necessary costs he has incurred in the action. Walker vs. Barron, 6 Minn., 508 (Gill, 353); Fitch vs. Stevens, 2 Met. (Mass., 506); Stoddard vs. Treadwell, 29 Cal., 281; Cregin vs. Brooklyn Cross Town R. R. Co., 19 Hun., 349; Howell vs. Van Siclen, 8 Hun., 524; Lanz vs. Trout, 46 How. Pr., 94; Wessels vs. Carr, 6 N. Y. Suppl., 535; Isaacs vs. New York Plaster Works, 43 N. Y. Supr., 397–401.

There is no doubt that there are many cases where applications are made for the exercise of the discretion of the Court, as in motions for continuances, motions for new trials for cause, and similar applications, in which the trial Court has ample power to regulate the costs to be recovered as one of the terms upon which it will exercise its discretion. No reference is made to these cases in this opinion. There was no application for the exercise of any discretion in the Court below, and none was exercised.

But the Circuit Court of the United States for the District of Columbia had, upon full consideration, decided and rendered an opinion, three years before the application for a new trial was made in this case, to the effect that the defeated party was not required to pay the costs of a mistrial in which the jury disagreed, in order to entitle him to a new trial under these statutes, and that decision had never been appealed from or reversed. No Court in Colorado or elsewhere, so far as we can learn, had given any other construction to these statutes. Was not this decision an authoritative declaration of the law of Colorado, and, until reversed, a rule of property and of practice upon which the plaintiffs in error had the right to rely? Chancellor Kent says:

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." Kent's Com., 476.

It is a principle of general jurisprudence that Courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the Circuit Courts of the United States. A deliberate decision of a question of law by one of these Courts is generally treated as a controlling precedent in every federal Circuit Court in the Union until it is reversed or modified by an Appellate Court. Striking illustrations of this principle will be found in Goodyear Dental Vulcanite Co. vs. Willis, 1 Flip., 388, 393, in which Judge Emmons said of these Courts: "They constitute a single

system; and when one Court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the Appellate Court." Washburn vs. Gould, 3 Story, 122, 133; The Chelmsford, 34 Fed. Rep., 399, 402, in which Judge Butler said:

"As respects the claim for supplies furnished in Boston at the owner's instance—8694.45—and forwarded to the vessel at Portland, I should have no hesitation in disallowing it in the absence of authority on the subject. * * * I find, however, that the precise question has been decided the other way, in the Sarah J. Weed, 2 Low., 555, the Agnes Barton, 26 Fed. Rep., 542, and the Huron, 29 Fed. Rep., 183. * * * In neither of the cases is the subject discussed at any length, or any adequate reason assigned, in my judgment, for the conclusion reached. So great, however, is the importance I attach to uniformity of decision by Courts of co-ordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle." Wells vs. Oregon Ry. and N. Co., 15 Fed. Rep., 561, 570; Reed vs. Atlantic and P. R. Co., 21 Fed. Rep., 283; American Wood Paper Co. vs. Fiber Disintegrating Co., 3 Fisher, 363; Goodyear vs. Berry, 3 Fisher, 439; Simonds Counter Machinery Co. vs. Knox., 39 Fed. Rep., 702.

Nor has it been thought less vital to a wise administration of justice in the Federal Courts that the various Judges who sit in the same Court should attempt to overrule the decisions of each other, especially upon questions involving rules of property or practice, except for the most cogent reasons. In Cole Silver Mining Co. vs. The Virginia, etc., Co., 1 Sawyer, 685, 689, Mr. Justice Field

refused to review the action of the Circuit Judge on the ground that such a practice would lead to unseemly conflict. To the same effect are Oglesby vs. Attrill, 14 Fed. Rep., 214, 215; United States vs. Biebush, 1 McCrary, 42, 43; Appleton vs. Smith, 1 Dill., 202. In United States vs. Biebush, Judge McCrary declared that it was well settled in this circuit that the rulings of the District Judge while holding the Circuit Court were not subject to be reviewed in the same Court either by the Circuit Judge or the Circuit Justice. In Zinsser vs. Krueger, 45 Fed. Rep., 572, 574, Judge Green, while presiding in the Circuit Court for the District of New Jersey, held that a prior decision of a question of law by Judge Butler while he was sitting in that Court in another case became a precedent to be implicitly followed in that Court unless it clearly appeared that the principles which governed it had been grossly misunderstood or misapplied.

Moreover, there are no decisions to which the maxim *Stare decisis, et non quieta movere* applies more universally or with more salutary effect than to those which construe statutes that establish or declare rules of property. It is universally conceded that it is often more important that these rules should be certain and changeless than that they should be right. Men engaged in active business buy and sell in reliance upon them. Lawyers advise their clients and enforce and protect their rights with constant reference to them, and, while all interests will readily adjust themselves to and protect themselves under erroneous rules, there is neither protection nor safety for any interest under shifting rules. Seale vs. Mitchell, 2 Cal., 402 and 403; Bates vs. Relyea, 23 Wend., 336, 341; Goodell vs. Jackson, 20 Johnson, 693, 722.

In view of the principles and authorities to which we have adverted, it is not strange that the plaintiffs in error relied with confidence upon a construction given to the statutes of Colorado by the decision of the Circuit Court in 1890, and attempted to preserve their right to a new trial in accordance therewith. That decision was delivered by a Judge whose opinions command the respect and confidence of lawyers and laymen, and it was an authoritative declaration of the law after careful consideration by a Court of high rank. It was apparently the only decision upon the question. According to the concurring opinions and practice of the Federal Judges, this decision was a very persuasive, if not a binding, precedent, not only in the Circuit Court in Colorado, but in all other United States Circuit Courts, until reversed or modified by an appellate Court. It was a rule of property, a rule to which the doctrine of *stare decisis* is peculiarly applicable, and it was a rule of practice in the Court in which this case was pending. It was in this state of the law that the plaintiffs in error paid the costs which they were required to pay to entitle them to a new trial according to this decision, and applied to the Court for that trial within the time prescribed by the statutes. It is not an unreasonable presumption that they would have paid all the costs of the defendants in error if the decision of the Circuit Court, which had stood unchallenged for three years and which we now think was erroneous, had never been rendered. It may well be presumed, too, that if the Circuit Court had announced, when the application was made, that the former decision would be overruled and that the true construction of the statute required the payment of all the costs, that the plaintiffs in error would have paid the costs of the mistrial then, for there was yet time to do so under the statute.

The delay of the decision for six months brought its rendition too late to enable them to do so, and gave the order the vicious effect of a retrospective law. The plaintiffs in error were hardly bound to presume that the rule which had been established by the Circuit Court and had stood unchallenged for three years was not the law. Under these circumstances, we are of the opinion that this order ought not to be affirmed so as to give it this retroactive effect. Neither Courts nor Legislatures should give a retrospective effect to radical changes in rules of property or of practice. It was not the fault of the Court below that the business of that Court so crowded upon its attention that it could not decide this application for six months after it was made, but the plaintiffs in error ought not to suffer on this account. It is a maxim of the law that "An act of the Court shall prejudice no man." Broom's Legal Maxims, 122; Rodman vs. Reynolds, 114 Ind., 148, 150.

In Rodman vs. Reynolds, *supra*, the Supreme Court of Indiana said:

"It is reasonable to make a party responsible for what he does himself, or for what he omits to do, but it is not reasonable to make him responsible for what the Court does or omits to do. In such a case as this the party cannot compel the Court to act upon his application, and he ought not to be bound by the delay of the Court, if he has himself done what was required of him."

The object of the trial of lawsuits is to reach just decisions, and to thereby preserve and protect the rights of litigants. In this case the substantial rights of all parties will, in our opinion, be preserved and the ends of justice best subserved, by an order which will put the parties in this action as nearly as may be in the situation in which they would have been if the change in the rule

established by the Circuit Court had been made when the application for a new trial was presented.

Accordingly, the order denying the new trial will be reversed, and the cause will be remanded to the Circuit Court with directions to enter an order denying the new trial, unless the plaintiffs in error shall, within sixty days after such order is entered, pay to the defendants in error their costs of the mistrial, to wit, $1,814.81 and interest thereon at the rate of eight per cent per annum from November 2, 1893, until it is paid, and, in case such payment is made within that time, to enter an order granting the new trial, but in case such payment is not so made, to make the order denying it absolute; and it is so ordered.

THAYER, J., dissenting.

I agree with my associates that Section 272, Chapter 23, of the Colorado Code of Civil Procedure, rightly construed, requires the party against whom a verdict is rendered to pay the costs of a prior mistrial to entitle him to a new trial as a matter of right. I further agree that the Judge to whom the application for a new trial was addressed might very properly have followed the ruling of the local District Judge in Parkhurst vs. Price, *supra*, even if he was of the opinion that that decision was probably erroneous, leaving the aggrieved party to prosecute a writ of error from the order granting the new trial. I cannot assent to the view, however, which seems to be maintained by my associates, that he was bound to follow the rule previously applied in Parkhurst vs. Price, if he thought that rule, as applied to the case at bar, was clearly wrong. Judge Hallett entertained doubt with respect to

the question, and decided it with much apparent hesitation. His language was as follows:

"When there is a mistrial or a failure of the jury to agree, and no order whatever is made in respect to such costs, it seems to me to be a logical conclusion that each party ought to pay the costs which he has made. *This, however, is so far doubtful, that I confess I should feel some embarrassment if I were acting as counsel in this case or in any other presenting a similar question.* * * * The clerk may conform the taxation to these suggestions, casting out all costs at the mistrial except meals for jurors."

Under the circumstances, I think the decision in Parkhurst vs. Price can hardly be said to have established a rule of property or procedure which all Judges sitting in the same Court were therafter bound to follow until the rule was reversed on appeal. But be this as it may, inasmuch as the statute was rightly construed in this case by the Circuit Court, and inasmuch as the plaintiffs in error did not, in fact, pay the costs entitling them to a new trial within the statutory period, I am of the opinion that this Court has no power to extend the time fixed by law for the payment of such costs. The right to a new trial depends upon a literal compliance with the conditions prescribed by statute, both as respects the costs to be paid and the time within which they shall be paid, and no Court, in my judgment, is vested with power to enlarge the time within which the costs must be paid to entitle the losing party to a new trial as a matter of right. For these reasons, I am constrained to dissent from the order reversing the case and granting sixty days within which to pay the costs. The view taken by my associates puts the Judge who acted on the motion for a new trial in the awkward predicament

of not being able to decide the case right, for in whichever way he decided it, he was bound to be reversed. Moreover, this Court makes an order awarding the plaintiff in error a new trial, which order would have been so far erroneous that it would have been reversed by this Court if it had been made by the Circuit Court. I think, therefore, that the judgment should be affirmed.

Filed September 2, 1895.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

Twelfth—After said cause had been argued and submitted on briefs to said Circuit Court of Appeals, and before the opinion was rendered, there went into effect in the State of Colorado an amendment to Section 272 of the Civil Code of Colorado, providing that only one trial as of right, on payment of costs, shall be granted in any cause, and said amended section was in force at the date of the rendition of such opinion, is now in force and is as follows:

"SECTION 272. Whenever judgment shall be rendered against either party under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby; and, upon application of the party against whom the same is rendered, his heirs or assigns, the Court shall vacate such judgment and grant a new trial in such case (*but only one trial shall be granted in any case, as of right, without showing cause*), and, after such judgment is vacated, the cause shall stand for trial the same as though it had never been tried."

Thirteenth—Four questions of grave importance are presented by this record:

1st. Can a case be pending on error to reverse one and the same judgment, in a Circuit Court of Appeals of the United States and in the Supreme Court of the United States, at one and the same time?

2d. Does the unpublished decision of a District Judge of the United States, while holding Circuit Court, constitute a rule of property, whether right or wrong, which is binding upon all other Judges and litigants in the same Court until reversed by an appellate Court?

3d. Has a United States Circuit Court of Appeals jurisdiction to reverse the decision of the lower Court, while expressly holding with it, both on the law and facts, upon the sole ground that another Judge while holding the same Court had previously delivered an erroneous opinion as to the same matters?

4th. Where a statute, giving a litigant the right, on payment of costs to a new trial, is repealed before the new trial is had, does not the right fall with the statute?

For the foregoing reasons and to determine and settle the foregoing questions, all of which more fully appear in the record of the preceedings in said cause in said United States Circuit Court of Appeals for the Eighth Circuit, your petitioners pray for a writ of certiorari to said Circuit Court of Appeals in said cause, commanding that the entire record thereof be forthwith certified and sent to this Court, to the end that all questions involved therein may be determined.

As in duty bound, your petitioners will ever pray.

WALTER S. CHEESMAN,
GEORGE W. CLAYTON,
Petitioners.

CHARLES J. HUGHES, JR.,
TYSON S. DINES,
Attorneys for Petitioners.

STATE OF COLORADO, } ss.
COUNTY OF ARAPAHOE, }

Tyson S. Dines, being duly sworn, says that he is one of the attorneys and of counsel for Walter S. Cheesman and George W. Clayton, the petitioners herein, and, as such, had personal charge of the case in the foregoing

petition named in the said Circuit Court of Appeals of the Eighth Circuit; that he has read the foregoing petition; that the facts therein stated are true to the best of his information and belief.

TYSON S. DINES.

Sworn to and subscribed before me this 27th day of April, A. D. 1896.

My term expires December 14, 1897.

HARRY C. WATT,
Notary Public.

Supreme Court U. S.
FILED
MAY 11 18
JAMES H. McKENNEY,
CLERK

IN

THE SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1895.

Walter S. Cheesman and George W. Clayton,
Petitioners,
vs.
James A. Shreve and others,
Respondents.

996

BRIEF FOR RESPONDENTS.

In Opposition to Petition for Certiorari.

THOMAS M. PATTERSON,
CHARLES C. PARSONS,
Attorneys for Respondents.

C. J. KELLY, Printer, Denver.

IN

THE SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1895.

Walter S. Cheesman and George W. Clayton,
Petitioners,
vs.
James A. Shreve and others,
Respondents.

BRIEF FOR RESPONDENTS.

In Opposition to Petition for Certiorari.

STATEMENT OF FACTS.

The brief for petitioners contains no separate statement of facts, the petition does not set out all the facts, and as there is no certified copy of the record from the Circuit Court of Appeals, it is deemed proper to state the facts briefly.

This is an action of ejectment commenced in the Circuit Court for the District of Colorado. There were three trials. The first resulted in a verdict for defendants, the second in a mis-trial, and the third in a verdict for plaintiffs. This verdict was practically by default, and judgment thereon was entered June 27, 1893. Defendants had demurred to the bill on the ground of lack of jurisdiction, and that being the only question in the case, sued out a writ of error from this Court to the Circuit Court on June 26, 1894. On November 2, 1893, defendants had filed a motion for new trial as of right, alleging payment of costs, and this motion was denied May 28, 1894, more than six months after the entry of the judgment. The bill of exceptions on this order was not signed until August 7, 1894, more than a year after the entry of judgment. These last two dates are not set out in the petition. A writ of error to the Circuit Court of Appeals for the Eighth Circuit was sued out November 23, 1894. In the Circuit Court of Appeals the defendants in error (petitioners here) filed a motion to dismiss, on the ground that there could not be two writs of error in the same case, one to this Court to review the judgment, the other to the Circuit Court of Appeals to review the order denying a new trial. The matter was argued in May, 1895, the motion to dismiss overruled and the order denying the new trial reversed on condition that a certain amount of costs should be paid. It is to review this action of the Circuit Court of Appeals that a writ of *certiorari* is now sought by

petitioners, defendants in error below. In opposition to the application, respondents urge the following

POINTS.

I.

NONE OF THE QUESTIONS OF LAW DECIDED BY THE CIRCUIT COURT OF APPEALS ARE OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT IN REVIEWING THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before the Act of March 3, 1891, "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," the writ of *certiorari* was issued by this Court only when a diminution of the record had been suggested, for the purpose of bringing up a more complete record from the Court below. By the "Evarts Act," this Court was given the power to issue *certiorari* to the circuit courts of appeals in cases where the decisions of those courts were made final by §6 of the Act. Inasmuch as the circuit courts of appeals were created for the express purpose of relieving the great pressure of business in this Court, it has been uniformly held by this Court that it will grant writs of *certiorari* only in those cases which affect such important interests and involve the decision of such weighty and far-reaching questions of jurisprudence as to make the settlement of those interests and questions by the

highest Court in the land a matter of vital necessity.

In re Woods, 143 U. S., 202.
In re Law Ow Bew, 141 U. S. 583.
Law Ow Bew v. United States, 144 U. S., 47.

"In the same spirit the authority conferred on this Court by the very provision on which the petitioners mainly rely, by which it is enacted that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, has been held to be *a branch of its jurisdiction which should be exercised sparingly and with great caution and only in cases of peculiar gravity and general importance* or in order to secure uniformity of decision." (Citing cases.) "Accordingly, while there have been many applications to this Court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted; the one in *Law Ow Bew's case* above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre, petitioner*, No. 1237 of the present term, an admiralty case which presented an important question as to the rules of navigation." *Mr. Justice* GRAY in *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U. S., 372–384.

Tested by these rules, is there anything in the case at bar which makes it of *"peculiar gravity and of general importance,"* so as to justify this Court in reviewing the decision of the Circuit Court of Appeals?

The petition alleges that there are four questions in the case which this Court ought to pass upon, for the reason, as alleged, that their settlement is very important to the welfare of the country at large. They are set out on pages 23 and 24 of the printed petition.

THE FIRST QUESTION is,

"Can a case be pending on error to reverse one and the same judgment in a Circuit Court of Appeals of the United States and in the Supreme Court of the United States at one and the same time?"

This question has been answered in the affirmative by the Circuit Court of Appeals in the case of *Glaspell v. Northern Pacific R. R. Co.*, 49 Fed. Rep., 483; but it is respectfully submitted that it has not arisen in the case at bar at all and a brief review of the facts will show this. There were three trials of the case; the first resulted in a verdict for defendants (respondents here), the second in a mis-trial and the third in a verdict for plaintiffs (petitioners here); within one year from the entry of judgment on the latter verdict defendants sued out a writ of error to this Court, on the sole ground that the Circuit Court had no jurisdiction of the action, that being the sole question in the case. Before the suing out of this writ of error and on November 2, 1893, defendants filed a motion for new trial as of right, alleging that they had paid the costs recovered by the judgment. In May, 1894, more than six months after the entry of the judgment aforesaid, the motion for new trial

was denied because all the costs were not paid. The bill of exceptions thereon was not signed until August, 1894. Afterwards and within six months a writ of error was sued out from the Circuit Court of Appeals to review the last-named order. The defendants in error there (petitioners here) filed a motion to dismiss the writ of error from the Circuit Court of Appeals, on the ground that there could not be a writ of error to this Court to review the judgment, and a writ of error to the Circuit Court of Appeals to review an order denying a motion for new trial as of right. *There are not two writs of error to review one judgment; one writ is to review the judgment, the other to review a subsequent order denying a new trial as matter of right.* The question is very plainly stated in the opinion of *Judge* SANBORN (Petition, pp. 7–9, 10); and the reasons for denying the motion there given are convincing.

It will be seen that, as the sole objection to the judgment was lack of jurisdiction in the Circuit Court, a writ of error to review the judgment must have been taken from this Court direct (Act of 1891, Sec. 5; *United States v. Jahn*, 155 U. S., 109; *Davis v. Barber*, 60 Fed. Rep., 465; *Glaspell v. Northern Pacific R. R. Co.*, 49 Fed. Rep., 483; *United States v. Sutton*, 47 Fed. Rep., 129; and *Mayor v. Georgia Packing Co.*, 60 Fed. Rep., 781). The order denying the new trial was not reviewable in the first instance in this Court (*Law Ow Bew v. United States*, 144 U. S., 47.) The defendants (respondents here) had no "election," within the rule laid down

in *McLish v. Roff*, 141 U. S., 661, as to which appellate court they would go to; *the judgment must go to this Court, the order to the Circuit Court of Appeals.* And, in any event, they could not have had the judgment and order reviewed at the same time, because *the order was not entered until more than six months after the judgment, and the bill of exceptions on this order was not signed until more than a year after.*

It is submitted that the decision of the Circuit Court of Appeals on this question is undoubtedly correct; but even if there is any doubt about it, the questions are not of great or general importance. They are only questions of practice, which cannot and will not arise again in many years, and *they became possible in the present case only by reason of the peculiar state of facts therein.* The cases in which there are final decisions after judgment, which may be reviewed by appellate courts, are exceedingly rare, and even in those few cases the judgment and order denying the new trial, can and will be reviewed in the one appellate proceeding. They would have been so reviewed in this case, had it not been for the long delay in deciding the motion for new trial from November until the following May, and the additional delay in signing a bill of exceptions, until the following August, which prevented the two matters being submitted at one time. This peculiar state of facts, which made the question possible in this case, is not likely to arise again once in a thousand times, and it is submitted that, al-

though the question raised may be interesting an novel it is not of such importance as to warrant th Court in reviewing the case because of it.

THE SECOND QUESTION which petitioners desir this Court pass upon is:

"Does the unpublished decision of a Distric Judge of the United States, while holding Circu Court, constitute a rule of property, whether righ or wrong, which is binding upon all other Judge and litigants in the same court until reversed b an appellate court?"

The rule of law which the Circuit Court o Appeals laid down in this case is, that when a ques tion has been decided by one Judge of a Federa court, another Judge of the same court is boun by all reasons of propriety, uniformity and justic to follow that decision in passing on the same stat of facts; and Judge Thayer does not expressly dis sent from this view. He does hold that, in view o peculiar circumstances attending the former decis ion, it did not come within the rule above stated (Petition, pp. 20, 21.)

The rule laid down in the majority opinion ha been upheld in any number of federal cases:

Goodyear Co. v. Willis, 1 Flip., 388, 393.
Washburn v. Gould, 3 Story, 122, 123.
The Chelmsford, 34 Fed. Rep., 399, 402.
Wells v. Oregon Ry., &c., Co., 15 Fed. Rep. 561, 570.

Reed v. Atlantic & Pacific Ry. Co., 21 Fed. Rep., 283.

Simonds Machinery Co. v. Knox, 39 Fed. Rep., 702.

Cole Silver M. Co. v. Virginia Co., 1 Sawyer, 685, 689, per Field, J.

Oglesby v. Attrill, 14 Fed. Rep., 214, 215.

United States v. Biebush, 1 McCrary, 42.

Appleton v. Smith, 1 Dillon, 202.

Zinsser v. Cruger, 45 Fed. Rep., 572.

The rule is well settled, and the only possible question is as to whether it was properly applied to the facts in this case. Whether the binding force of the first decision was taken away by the fact that *Judge* HALLETT expressed grave doubts as to its correctness, and by the further fact that the decision was not followed by counsel in the case in which it was made.

This question cannot, in any view, be of "*peculiar gravity and of general importance*," within the rule stated in *American Construction Co. v. Jacksonville R. R. Co.* (supra); its decision is important to the immediate litigants here, and to no one else; and, as was said of the first question, it is not likely to arise again for years and years to come.

This Court in the *Matter of the Application of Woods et al.* for a *certiorari* to the Circuit Court of Appeals for the Eighth Circuit (143 U. S., 207) held that the question whether a decision of the State Court in an action between the same parties involving the same subject matter, was binding in another

suit between the same parties in the Federal Cou rt was not of sufficient importance to warrant the issuance of a writ of *certiorari*, nor was the question as to whether the law of master and servant was properly applied to the facts in that case, sufficient:

Mr. Chief Justice FULLER says:

"We do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or *whether the law* in respect of recovery by a servant against his master for injuries received in the course of his employment *was properly applied in this case*, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

It is submitted that the real question on this branch of the case is, "Was a well-settled rule of law correctly applied to the facts?" and that *this is not "within the category of questions of such gravity "and general importance as to require the review of "the conclusions of the Circuit Court of Appeals."*

THE THIRD QUESTION, on page 24 of the printed petition is:

"Has a United States Circuit Court of Appeals jurisdiction to reverse the decision of the lower court, while expressly holding with it, both on the law and facts, upon the sole ground that another Judge, while holding the same Court, had previously delivered an erroneous opinion as to the same matters?"

The mere statement of this question shows that it is only of peculiar and very limited application, and could only arise in a case similar to the one at bar. It is really the second question stated in a different way. Instead of asking this Court to pass upon the question whether the Circuit Court of Appeals decided correctly in applying the rule of *stare decisis*, petitioners ask this Court to say whether the Circuit Court of Appeals "had jurisdiction" to apply the rule.

Counsel for petitioners seem to have so little faith in this as a possible question of "gravity and general importance," that they make no specific mention of it in their brief; and it is submitted that there is, in reality, no such question in the case the Circuit Court of Appeals undoubtedly had "*jurisdiction* to reverse the decision of the lower Court;" and, assuming, that there is such a question here, it is peculiar to this case, and will never, in all probability, arise again.

THE FOURTH QUESTION is:

"Where a statute, giving the litigant the right, on payment of costs, to a new trial, is repealed before the new trial is had, does not the right fall with the statute?"

This question arises on the following state of facts: At the time of the denial of a new trial in this case, the Colorado statute provided that in ejectment *either* party might have one new trial as of right on payment of costs, and the statute so

remained until after the argument of the writ of error in the Circuit Court of Appeals. Thereafter and pending a decision by the Court of Appeals, the statute was amended so as to allow *only one* new trial as of right in any action, and after this amendment the order of reversal was entered. *This question is now presented in the case for the first time.* Petitioners made no effort, by application for rehearing or otherwise, to call this amendment of the statute to the attention of the Circuit Court of Appeals; they permitted the mandate of that Court to be sent to the Circuit Court, and the order to be entered thereon, and now for the first time in the case they ask this Court to pass on the question and issue a *certiorari* for that purpose. Respondents respectfully insist that petitioners mistake the office of a writ of *certiorari; it is for the purpose of enabling this Court to pass on the questions presented to the lower Court*, not for the purpose of allowing the parties to present new questions, which were not submitted to the lower Court at all.

But aside from this, the question is one which can arise only in the few cases in ejectment, pending in the Circuit Court of Appeals of the Eighth Circuit on error to the Circuit Court for the District of Colorado, which were undetermined on July 16, 1895, when the amendment to the Colorado statute took effect. It is doubtful whether there are any other cases in which the question could arise, and the contingencies which would make the question of "general importance," such as similar amendments to similar statutes in the other states of the

Union, and the pendence of ejectment suits in appellate courts at the time of such amendments, are so very remote, as to make it comparatively unimportant to the world at large how it is decided. This view of the matter is confirmed by petitioners' brief (page 11), in which it is stated that "this proposition, while not of the scope and far-reaching effect of the others hereinbefore suggested, is yet a question of importance and directly involved in the present proceeding." But it is important in this proceeding only.

THE FIFTH QUESTION, which is not stated in the petition but is numbered III. in the brief of petitions, is as follows:

"Had the Circuit Court of Appeals for the Eighth Circuit jurisdiction in this case upon writ of error, to extend the time within which the costs were required to be paid by the statute of Colorado, for more than one year after the time fixed by the express terms of the statute under and by virtue of which alone the right to a new trial upon the payment of costs arises?"

This question, more so than any of the others presented, is peculiarly limited to cases the facts in which are similar to the one at bar. There is no real question of jurisdiction involved; the inquiry is as to whether the Circuit Court of Appeals, under the facts in the case at bar and the wording of the Colorado statute governing new trials in ejectment, acted properly in granting a new trial on condition that a sum of money was paid. They

held, in effect, that at the time of the motion for a new trial there was a rule of practice in the Circuit Court for Colorado defining "the costs recovered by the judgment;" that defendants paid the costs fixed by the rule, and that the new trial should have been granted; but, inasmuch as the plaintiffs were entitled to more costs than were specified in the rule, defendants must pay such costs as a condition precedent to the granting of the new trial.

Such a question can arise only in an action for ejectment where a new trial has been refused for non-payment of costs, under statutes similar to the Colorado statute, when a former erroneous decision of the same Court has established a rule as to what costs are recovered by the judgment; and inasmuch as counsel in their arguments before the Court of Appeals were unable to cite any case where a decision of the question either way had been made, it is extremely unlikely that the matter will ever come up again for determination.

The foregoing five questions are all that counsel for petitioners have been able to evolve as furnishing reasons why this Court should review the judgment of the Circuit Court of Appeals; they are, in fact, all the questions which could arise on an argument in this Court; and counsel for petitioners must, therefore, believe that in every aspect of this case it is one "of peculiar gravity and general importance." Respondents respectfully insist

that none of these questions is of gravity or importance to anyone but the litigants in this case and that it is not likely any of them will ever have to be passed on again. All of them, except the first, arise under the Colorado statute governing new trials in ejectment and the circumstances of this particular case, and the first question, one of practice, although general in its application, was possible only because of those facts.

II.

THE APPLICATION IS NOT MADE AS REQUIRED ON THE RULE AND MUST BE DENIED.

After the passage of the Act of March 3, 1891, this Court promulgated Rule 37, subdivision 3 of which is as follows :

"Where application is made to this Court under Section 6 of the said Act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this Court by the applicant as part of the application."

All that petitioners have filed in this Court in support of this application is a petition, verified by Mr. Dynes, setting forth such facts as they deem relevant to a correct understanding of the matter. This is not sufficient.

See *In re Law. Ow. Bew.*, 141 U. S., 583.
In re Woods, 143 U. S., 202.